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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79 .....

THE UNITED STATES OF AMERICA and THE CROW TRIBE OF INDIANS, MONTANA

Respondents,

v.

THE STATE OF MONTANA, MONTANA STATE FISH AND GAME COMMISSION, JOSEPH H. KLABUNDE, SPENCER S. HEGSTAD, EARL L. SHERROW, JR., ALFRED L. BISHOP, and PAUL B. TIHISTA; BIG HORN ROD & GUN CLUB; and CITIZENS RIGHTS ORGANIZATION,

Petitioners.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPENDIX A

AMENDED OPINION

UNITED STATES v. STATE OF MONTANA

The UNITED STATES OF AMERICA and THE CROW TRIBE OF INDIANS, MONTANA,

Appellants'

v.

The STATE OF MONTANA, Montana State Fish and Game Commission, Willis B. Jones, Arnold Rieder, Arthur C. Hagenston, Joseph H. Klabunde, W. Leslie Pengelly, and Wesley R. Woodgerd,

Appellees

Nos. 78-2917, 78-2865

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

JUNE 12, 1979

As Modified on Denial of Rehearing

Sept. 20, 1979

The United States, in its own right and as fiduciary on behalf of the Crow Tribe of Indians sought to quiet title to the bed and banks of Big Horn River. The United States District Court for the District of Montana, James F. Battin, J., 457 F. Supp. 599, declared that the State of Montana owned the bed and banks of the Big Horn River and that it had power and authority to regulate hunting and fishing by non-Indians within the exterior boundaries of the Crow Indian Reservation. On appeal, the Court of Appeals, Sneed, Circuit Judge, held that: (1) title to bed and banks of Big Horn River on Reservation is held in trust by United States; (2)

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*The Shoshone Indian Tribe and the Assinibone and Sioux Tribes filed a brief as *amicus curiae* urging reversal.

resolution of Tribe regulating hunting and fishing was valid except as to nonmembers of Tribe on fee patent lands on which such nonmembers reside; (3) Tribe had power to regulate hunting and fishing on Reservation by nonmembers of Tribe subject to certain limitations, and (4) State of Montana also had power to regulate hunting and fishing on Reservation by nonmembers of Tribe subject to certain limitations.

Reversed and remanded.

Steven E. Carroll, Atty., U.S. Dept. of Justice (argued), Washington, D. C., for the U.S.

Urban L. Roth, Sp. Asst. Atty. Gen. (argued), Butte, Mont., for State of Mont.

Thomas K. Schoppert (argued), Lynaugh, Fitzgerald, Schoppert, Skaggs & Essman, Billings, Mont., for Crow Tribe of Indians.

Appeal from the United States District Court for the District of Montana at Billings.

Before SNEED and ANDERSON, Circuit Judges, and D. WILLIAMS,** District Judge.

SNEED, Circuit Judge:

This is an appeal by the United States and the Crow Indian Tribe (appellants) from a final declaratory judgment entered by the district court (D. Mont.) in an action brought against the State of Montana seeking to determine title to the bed of the Big Horn River within the exterior boundaries of the Crow Indian Reservation and to resolve certain

** Hon. David W. Williams, United States District Judge for the Central District of California, sitting by designation.

questions regarding the authority to regulate the hunting and fishing activities of non-Indians and others not members of the Crow Tribe within the exterior boundaries of the reservation. We note jurisdiction under 28 U.S.C. § 1291, and reverse.

FACTS

The Crow Indian Reservation is the remnant of a much larger tract of land recognized as Crow lands by the United States in the Treaty of Fort Laramie of 1851, 11 Stat. 749. In 1868, this original reservation was diminished from one of 38,531,174 acres to one of approximately 8,000,000 acres by the Second Treaty of Fort Laramie, 15 Stat. 649. Subsequent Congressional Acts have reduced the size of the reservation even further to its present acreage of approximately 2,282,764 acres.[1] The Big Horn River is a navigable watercourse that flows through the heart of the reservation from south to north.

The Treaties of 1851 and 1868 contain only two explicit references to hunting and fishing rights. Article 5 of the Treaty of 1851 states that the eight Indian nations signatory to the treaty "do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described." Article 4 of the Treaty of 1868 provides that the Indians "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." Notwithstanding these scant references to the Crow Tribe's hunting and fishing rights, Article 2 of the Treaty of 1868 specifically

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[1] *See* 22 Stat. 42 (1882); 26 Stat. 989 (1891); 33 Stat. 352 (1904); 50 Stat. 884 (1937). *See also* the maps reproduced in *United States v. Finch*, 395 F. Supp. 205, 215 20 (D. Mont. 1975).

describes the reservation as that place "set apart for the absolute and undisturbed use and occupation of the Indians."

Originally, all land within the reservation was held by the United States in trust for the Crow Tribe. No land could be transferred to non-Indians. The Allotment Acts of 1887 and 1920,[2] however, provided that patents in fee could be issued by the United States to individual Indian allottees. Once these patents were issued, the allottees could convey their land to non-Indians. At present, approximately 30% of the land within the reservation is owned in fee. The great majority of the remainder is owned by the United States in trust either for individual Indians or for the Crow Tribe.[3]

In 1973, the Crow Tribal Council passed Resoultion 74-05 which prohibits hunting and fishing within the reservation by everyone other than members of the Crow Tribe.[4] The State of Montana,

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[2] 24 Stat. 388; 41 Stat. 751.

[3] Of the 2,282,764 acres of reservation land that remains, the ownership can be broken down as follows:

Type of Ownership	Acreage	Percentage of Ownership to Total Acreage
Allotted	1,187,592.34	52.02%
Tribal (Surveyed)	379,740.64	16.64%
Tribal (Unsurveyed)	15,850.85	.69%
Government Owned	1,400.50	.07%
Yellowtail Dam	6,695.64	.29%
State Lands	44,804.82	1.96%
Fee Lands	646,679.12	28.33%
TOTAL:	2,282,764.00	100.00%

United States v. Montana, 457 F. Supp. 599, 602 (D. Mont. 1978).

[4] Resoultion 74—5 states in part:
Be it ordained by the Crow Tribe, meeting in a duly held and noticed

however, as it has done in the past, continues to authorize hunting and fishing within the reservation by announcing the opening and closing of hunting seasons to all lands within the reservation and by issuing hunting and fishing licenses which purport to allow those not members of the Crow Tribe to hunt and fish within the reservation. This conflict between the State of Montana and the Crow Tribe concerning hunting and fishing within the reservation has resulted in this present action.[5]

In the court below, appellants sought a judgment declaring that: (1) The United States holds title to the bed and banks of the Big Horn River within the exterior boundaries of the Crow Indian Reservation in trust for the Crow Tribe; (2) The Crow Tribe has authority to prohibit hunting and fishing within the reservation by those not members of the Crow Tribe; and (3) The State of Montana has no authority to regulate hunting and fishing within the exterior boundaries of the reservation. The district court held that: (1) The title to the bed and banks of the Big Horn River to the high water mark is held by the State of Montana; (2) The State of Montana has ex-

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council that hunting, fishing and trespassing within the exterior boundaries of the Crow Indian Reservation is hereby prohibited and the proper officials of the United States and the Crow Tribe of Indians are hereby directly and authorized to enforce the provisions of this ordinance and any federal statute which would prohibit such hunting and fishing and trespassing, provided, however, that the provisions of this ordinance shall not apply to the members of the Crow Tribe of Indians.

Be it further resolved, that the Crow Tribal officials inform the State Fish and Game Department for the State of Montana and Bureau of Indian Affairs (United States Department of Interior) that hunting and fishing on the Crow Reservation is hereby closed.

[5] Because the Crow Tribe itself was a party bringing this action, this case therefore is clearly distinguishable from *California v. Quechan Tribe of Indians*, 595 F.2d 1153 (9th Cir. 1979). In that case we held barred by sovereign immunity a suit brought by California *against* a tribe.

clusive jurisdiction to regulate non-Indian hunting and fishing activities on the Big Horn River and all patented land owned by non-Indians within the exterior boundaries of the Crow Indian Reservation; (3) The State of Montana has concurrent jurisdiction with the United States to regulate non-Indian hunting and fishing activities on tribal or Indian lands if such activities are in violation of state law; (4) The Crow Tribe's exclusive rights of hunting and fishing within the reservation are limited to those lands set forth in 18 U.S.C. § 1165; and (5) The Crow Tribe has no authority to regulate non-Indian hunting and fishing activities within the exterior boundaries of the reservation, save in granting permission to non-Indians to trespass on tribal or Indian lands for the purpose of hunting and fishing. *United States v. Montana*, 457 F. Supp. 599, 611 (D. Mont. 1978).

We reserve and remand to the district court with instructions to enter a judgment consistent with the holdings of this opinion. Our holdings are as follows:

[1] (1) That the title to the bed and banks of the Big Horn River to the ordinary high water mark situated within the exterior boundaries of the Crow Indian Reservation is held in trust by the United States for the use and benefit of the Crow Tribe of Indians.

[2] (2) That Resolution 74-05 adopted by the Crow Tribe, meeting in a duly held and noticed council, is a valid exercise of tribal power except insofar as it attempts to proscribe all hunting and fishing by those not members of the Crow Tribe (whether Indians or non-Indians) on fee patent lands on which such non-members reside.

[3] (3) That the Crow Tribe has the power to regulate hunting and fishing within the exterior boundaries of the Crow Indian Reservation by non-

members of the Crow Tribe (whether Indian or non-Indian) subject to the following limitations:

(a) That the Crow Tribe lacks the power to impose criminal sanctions on non-Indians who violate its hunting and fishing regulations,

(b) That the exercise by the Crow Tribe of its power to regulate hunting and fishing by non-Indians must be within the constraints recognized by this court in *Quechan Tribe of Indians v. Rowe*, 531 F.2d 408 (9th Cir. 1976),

(c) That the regulation of hunting and fishing by non-members of the Crow Tribe (whether Indians or non-Indians) who reside on fee patent lands within the reservation, whether such hunting and fishing is done on such lands or elsewhere within the reservation, must be reasonable and consistent with sound principles of conservation.

[4] (4) That the State of Montana also has the power to regulate hunting and fishing within the exterior boundaries of the Crow Reservation by non-members of the Crow Tribe (whether Indians or non-Indian) subject to the following limitations:

(a) That such regulations of the State of Montana not regulate indirectly the hunting and fishing by members of the Crow Tribe.

(b) That such regulations of the State of Montana must have as their purpose the conservation and proper management of game and fish and not to discriminate against, nor to impede authorized regulations, by the Crow Tribe.

The authorities and reasons supporting these holdings are set forth in the balance of this opinion.

I.

BED AND BANKS OF BIG HORN.

We have previously considered the status of the title to the bed and banks of the Big Horn River within the exterior boundaries of the Crow Reservation. *United States v. Finch,* 548 F.2d 822 (9th Cir. 1976), *vacated,* 433 U. S. 676, 97 S.Ct. 2909, 53 L.Ed.2d 1048 (1977).[6] We held that to the ordinary high water mark the title to the bed and banks of the Big Horn is held by the United States in trust for the Crow Tribe. Although our judgment was vacated by the Supreme Court on grounds not related to the issue of title, we regard our holding in *Finch* as the applicable authority in this circuit. While recognizing that the issue is a close one, we again hold, as did *Finch,* that within the exterior boundaries of the reservation, the United States, not the State of Montana, holds the title and that that title is held in trust for the Crow Tribe.

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[6] *United States v. Finch,* 548 F2d 822 (9th Cir. 1977), involved a criminal prosecution under 18 U.S.C. § 1165, which makes punishable the unauthorized entry upon Indian lands for the purpose of hunting fishing or trapping. While standing on the bank of the Big Horn River within the Crow Indian Reservation, the defendant had cast a fishing lure into its waters. He was subsequently charged with violating section 1165. The district court dismissed the information on the ground that Montana owned the bed of the Big Horn River and that, therefore, there had been no unauthorized entry upon Indian lands. We reversed, holding that the United States, by signing the Treaty of 1868, granted the Crow Tribe dominion and control over that portion of the bed of the Big Horn River situated within the reservation and that the defendant had therefore made an entry upon Indian land. *United States v. Finch, supra,* 548 F.2d at 831. Although the Supreme Court vacated our decision on double jeopardy grounds, 433 U.S. 676, 97 S.Ct. 2909, 53 L.Ed2d 1048 (1977), our analysis of the title issue was in no way questioned.

II.
VALIDITY OF TRIBAL REGUALTION 74-05

The power of the Crow Tribe to exclude those not members of the tribe from hunting and fishing within the exterior boundaries of the reservation has its source in the treaties of 1851 and 1868. As already indicated, Article 5 of the Treaty of 1851 recognized that none of the Indians whose tribes were parties to the treaty surrendered "the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described." It was recognized in *Crow Tribe of Indians v. United States,* 284 F.2d 361, 151 Ct.Cl. 281 (1960), *cert. denied,* 366 U.S. 924, 81 S.Ct. 1350, 6 L.Ed.2d 383 (1960) that this provision permitted entry by members of each of the signatory tribes on the territory as described in the treaty of each other signatory tribe for the purpose of hunting and fishing. At the same time, the Treaty of 1851 recognized the title of the Crow Tribe to the lands described therein as belonging to it. *Crow Tribe of Indians v. United States, supra.*

This recognition was confirmed by the circumstances surrounding the execution, as well as the language, of the Treaty of 1868. In *United States v. Finch,* supra, 548 F.2d at 830-31, we pointed out that the purpose of the 1868 treaty was to reduce the size of territory designated by the Treaty of 1851 as belonging to the Crow. We also pointed out that the 1868 treaty contained an explicit agreement by the United States that the reduced territory would be "set apart for the absolute and undisturbed use and occupation of the Indians herein named and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them. . ." Fur-

thermore, the 1868 treaty stated:

> [T]he United States now solemnly agrees that no person, except those herein designated and authorized so to do, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian Reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians . . .

Art. 2, 15 Stat. 649.

By acquiring from the Crows a very substantial part of the territory set apart for them, by the 1851 treaty the United States "intended that all lands therein [the reduced territory], including the riverbed, were to be for the exclusive use of the tribe." *United States v. Finch, supra,* 548 F.2d at 831. However, the 1868 treaty in Article 4 accorded the Indians a qualified right to hunt on the land acquired from the Crows by the United States. The Article provides that the Indians "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts."

It must be admitted that the two treaties do not establish irrefutably the validity of Tribal Regulation 74-05. At the time of the treaties the Crows were primarily hunters of buffalo and elk and their hunting parties did not always remain within their treaty-designated territory, a fact the Treaty of 1868 explicitly recognized. Nor was their treaty-designated territory an area within which only they, but not others, hunted. Immigrants destined for Oregon and California as well as other Indians undoubtedly hunted and fished within this territory.

Big game stocks, however, were being depleted, a fact that caused anxiety among the Crows and official concern on the part of the United States. In *Finch*, we construed the Treaty of 1868 to reflect this official concern and to "set aside lands which would provide the tribe with the food and natural resources upon which their livelihood depended." We declined to interpret the Treaty to deprive the Crows of "potential control over [any] source of food on their reservation." 548 F.2d at 832. This Treaty, augmented by 18 U.S.C. § 1165, which makes going on Indian land to hunt or fish without permission a criminal offense, led us in *Finch* to hold that "the right of Indians to control hunting, trapping and fishing on their lands is a prerogative of ownership which the United States recognizes as a matter of federal law." 548 F.2d at 834. We do not retreat from that holding.[7]

We must, however, here confront an issue that was absent in *Finch*. It is the extent to which the Crows can prohibit hunting and fishing within the reservation by those who, while not members of the tribe, reside on fee patent lands within the reservation. Tribal Regulation 74-05 entirely proscribes hunting and fishing by *all*, except those who are members of the Crow Tribe. By attempting to preclude *all* hunting and fishing by non-members of the Crow Tribe who reside on fee patent land within the reservation we believe the Crow Tribe exceeded its power under the treaties as augmented by 18 U.S.C. § 1165.

We take this position in full awareness that im-

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[7] Of course, to the extent that Crow Tribal Resolution 75—17b purports to allow the Crow Tribe to exercise criminal jurisdiction over non-Indians in order to enforce 74—05, it is invalid under the holding in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed2d 209 (1978).

pairment or modification of a treaty right is not lightly to be imputed to Congress. *See, Menominee Tribe of Indians v. United States,* 391 U. S. 404, 413, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968). Nonetheless, it is a fact that subsequent to the 1851 and 1868 treaties Congress enacted the General Allotment Act of 1887[8] and the Crow Allotment Act of 1920,[9] one of the recognized consequences of which was the occupation in time of fee patent lands by non-Indians and perhaps other Indians not members of the Crow Tribe. Substantial assimilation was a goal of these Acts. [10] While neither of these Acts, nor any other to which our attention has been called,[11] explicitly qualifies the Tribe's rights over hunting and fishing, it defies reason to suppose that Congress intended that non-members who reside on fee patent lands could hunt and fish thereon only by consent of the Tribe. So far as the record of this case reveals, no efforts to exclude completely non-members of the Crow

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[8] 24 Stat. 388, 25 U.S.C. § 331 et seq.

[9] 41 Stat. 751.

[10] 59 Cong.Rec. 6000 (1920) (remarks of Rep. Riddick quoting Frank Yarlott, tribal representative):

As the bill now stands, it has the unqualified endorsement of the entire tribe. To the educated Indians who have closely watched events this seems the best solution to the long vexed "Indian problem." This means the gradual influx of white settlers, with whom the Indians will become acquainted and gradually absorb their methods of farming and cattle raising. They will come to understand the white temperament gradually and be friends.

[11] *See* Act of April 11, 1882, 22 Stat. 42; Act of July 10, 1882, 22 Stat. 157; General Allotment Act, Act of February 8, 1887, 24 Stat. 388, 25 U.S.C. § 331 et seq.; Act of March 3, 1887, '24 Stat. 545; Act of February 12, 1889, 25 Stat. 660; Act of March 1, 1893, 27 Stat. 529; Act of April 27, 1904, 33 Stat. 352; Act of June 4, 1920, 41 Stat. 751; Act of May 26, 1926, 44 Stat. 658;Acts of April 15 and July 3, 1930, 46 Stat. 168 and 860, 876; Act of July 15, 1958, 72 Stat. 361. Section 2(d) of this last Act specifically confirms the right of members of the Crow Tribe to fish without state regulation on those parts of the reservation taken for Yellowtail Dam and Reservoir.

Tribe from hunting and fishing within the reservation were being made by the Crow Tribe at the time of enactment of the Allotment Acts.[11A] Game had grown scarce and the agrarian life in a substantially assimilated society appeared to offer the Crows the means of survival.[12] Undoubtedly the desire for land by non-Indians constituted an additional force behind the passage of the Allotment Acts. The presence of this force in no way weakens, indeed, it

[11A] Exhibits covering the years 1912 to 1923, a time bracketing the periods of the 1920 Allotment Act, demonstrate a concern with non-Indian hunters on the Crow Reservation. (Pl.Exs. 5—27.) At that time a federal statute prohibited non-Indian hunting in Indian country except for subsistence purposes. (Pl.Ex. 22). The concern focuses predominantly upon "hunting parties on the reservation which had become so frequent as to reduce the wild game materially, and in some cases interfered with the grazing of live stock on the reservation." (Pl.Ex. 10.) These exhibits demonstrate concern not only for overhunting by non-Indians, but also bad hunting practices by Indians themselves, indicating that even they should be subject to state hunting regulations. (Pl.Ex. 23.)

The end product of this concern is a set of regulations enacted by the Crow Tribe forbidding fishing or hunting on the reservation except upon a permit issued by the superintendent of the reservation. Hunting of larger game, the numbers of which had been badly depleted, was not to be permitted at all. (Pl.Ex. 25.) The fees called for and references to the revenue derived therefrom indicate that the regulation may have had a not insignificant money raising purpose. (pl.Exs. 25 & 26.) Moreover, the regulation clearly foresaw a close interrelationship between the reservation-issued permits and state regulation. Limits and seasons of the state regulation applied to all permittees.

These exhibits also distinguish, albeit not in a precise manner, between non-resident non-Indians and resident non-Indians. Thus the allowance of "subsistence" hunting and fishing recognizes the rights of resident non-Indians to gather food and game necessary to life. Interior Department correspondence recognizes the difficulty in not permitting bona fide residents of the reservation to hunt (Pl.Ex. 9.) Some correspondence notes that the existing practice was to prohibit hunting and fishing by "outsiders." (Pl.Exs. 15, 17 & 18.) The Department of the Interior also recognized the difficulty of preventing fishing along streams with considerable patent land, seemingly recognizing that the holders of that land might fish if they so chose. (Pl.Ex. 22.) It appears on this record that no serious effort to completely forbid hunting and fishing by all non-Indians on reservation lands was made.

[12] See note 10, *supra*.

only strengthens, our belief that Congress did not intend to make the fee patent land occupier's bagging of game from his front step subject to permission of the Crow Tribal Council.

We must recognize that in this case, as in others in which we are required to fix the rights and powers of Indians in the latter part of the twentieth century in the light of treaties of an earlier century, our task is to keep faith with the Indian while effectively acknowledging that Indians and non-Indians alike are members of one Nation. Both seek power and gain through identical processes, *viz.* commerce, politics, and litigation. We must, however, live together, a process not enhanced by unbending insistence on supposed legal rights which if found to exist may well yield tainted gains helpful to neither Indians nor non-Indians.

In this spirit we hold that, as to those not members of the Crow Tribe who reside on fee patent lands within the reservation, Tribal Regulation 74-05 is invalid insofar as it attempts to proscribe all hunting and fishing on the lands on which such non-members reside.[13] Two aspects of our holding require emphasis. The first is that the proscription is lifted only with respect to non-members who reside on fee patent lands within the reservation. Such resident non-members may be owners of fee patent lands or those whose occupancy is authorized by an owner as, for example, tenants or employees. Non-resident non-member owners remain subject to the exclusion. The second is that non-member residents enjoy freedom from the absolute proscription only with respect to hunting and fishing on tracts on which they reside. With respect to all other territory within the reser-

[13] The extent to which the Crow Tribe may *regulate* hunting and fishing by resident non-members is discussed in Part III, *infra*.

vation they are subject to the regulation's bar. In this manner we believe the regulation is accorded a scope that keeps faith with the Crows while avoiding a construction that could only foster confrontations of an unpredictable character.

The distinction between non-member residents and non-resident non-member owners rests on the proposition that modifications of Indian treaty rights should be narrowly construed. Our modification with respect to non-member residents recognizes that those who "live on the land" in the West are likely to regard hunting and fishing thereon to be as natural and ordinary as working, sleeping, and eating.[13A] Those who do not "live on the land" are somewhat less inclined. We, therefore, group all non-resident non-members together even though some in fact may own fee patent land within the reservation.

III.

POWER OF CROW TRIBE AND THE STATE OF MONTANA TO REGULATE HUNTING AND FISHING BY THOSE NOT MEMBERS OF THE TRIBE WITHIN THE CROW RESERVATION.

The power to exclude those not members of the Crow Tribe from hunting and fishing within the exterior boundaries of the Crow Reservation that Tribal Regulation 74-05 asserts, the validity of which we have substantially upheld, does not perforce embrace the exclusive power to regulate hunting and fishing by non-members within the reservation. The

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[13A] Evidence that federal officials recognized to some degree this residential right to pursue game is found in exhibits noting problems with non-Indian hunters impinging on Indian lands but allowing "subsistance" hunting and possibly even recognizing the right of owners to fish on patent land within reservations. See note 11A, *supra*.

private owners of land may exclude the public from hunting and fishing thereon; his admission of the public, however, does not clothe him with all the raiment of sovereignty.

The Crow Tribe with respect to its reservation is, of course, more than merely a private owner. The Tribe possesses "attributes of sovereignty over both their members and their territory. . . ." *United States v. Wheeler,* 435 U.S. 313, 323, 98 S.Ct. 1079, 1086, 55 L.Ed2d 303 (1978). These "attributes spring from "*inherent powers of limited sovereignty which [have] never been extinguished.*" 435 U.S. at 322, 98 S.Ct. at 1086 (quoting F. Cohen, Hanbook of Federal Indian Law, 122 (1945) (emphasis in original). On the other hand, the sovereignty of the Crow Tribe is *limited.* "It exists only at the sufferance of Congress and is subject to complete defeasance." 435 U.S. at 323, 98 S.Ct. at 1086. It does not embrace, for example, criminal jurisdiction over non-Indians. *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978). Moreover, the Court in *Oliphant* observed:

> "Indians are within the geographical limits of the United States. The soil and people within these limits are under the political control of the Government of the United States, or of the States of the Union. There exists in the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they . . .exist in subordination to one or the other of these two." *United States v. Kagama,* 118 U.S. 375, 379, 6 S.Ct.1109, 1111, 30 L.Ed. 228 (1886). 435 U. S. at 211, 98 S.Ct. at 1022.

This court on two occasions has spoken specifically about the power of Indian tribes to regulate hunting and fishing within their reservations. In *Quechan*

Tribe of Indians v. Rowe, 531, F2d 408 (9th Cir. 1976), after recognizing the power to control hunting and fishing on its reservation, we delineated its powers in the following manner.

> Given those powers, the Quechan Tribe may exercise several types of authority over non-members who enter the reservation to hunt or fish. These are the right to determine who may enter the reservation; to define the conditions upon which they may enter; to prescribe rules of conduct; to expel those who enter the reservation without proper authority or those who violate tribal, state or federal laws; to refer those who violate state or federal laws to state or federal officials; and to designate officials responsible for effectuating the foregoing.

531 F.2d at 411.

Also, after denying that the Quechan Tribe had authority to assert criminal jurisdiction over non-members who violate tribal law while on the reservation, we further held the Tribal could not cause a forfeiture of a non-member's weapons or other property as a consequence of violating tribal law.

The second occasion was in *United States v. Sanford,* 547 F.2d 1085 (9th Cir. 1976), a case pertaining to hunting by non-members of the Crow Tribe on the Crow Reservation. We held that on the basis of the record before us Montana game laws were applicable to hunting and fishing by non-members on the Crow Reservation. We accepted as correct the following statement made by the Supreme Court of Montana in *State v. Danielson,* 149 Mont. 438, 4276 P.2d 689, 692-93 (1967):

> [T]he State of Montana has jurisdiction to enforce its fish and game regulations on Indian reservations contained within its boundaries with respect to

persons who are not tribal Indians unless precluded from doing so by an act of Congress or unless such enforcement would interfere with self-government on the reservation.

Our task is to adjust the powers of the Crow Tribe and the State of Montana in a manner consistent with these authorities. We lack the power to alter them even if we wished to do so. We approach this task convinced that the preservation and improvement of the stocks of fish and game within the State of Montana, as well as the Crow Reservation, requires the cooperation of the United States, the State of Montana, and the Crow Tribe. The nature of this cooperation cannot be fixed by reference to the contributions made in the past by each of the three to fish and game conservation. Rather it must rest on the above authorities and be shaped by the best judgment of which we and all parties to this lawsuit are capable.

So guided, our holdings, as previously indicated, are as follows. The Crow Tribe, to the extent it permits hunting and fishing within the exterior limits of its reservation by non-members, must regulate such hunting and fishing in the manner prescribed in *Quechan Tribe of Indians v. Rowe.* That is, the Tribe may fix the seasons and limits with respect to each species of game or fish applicable to non-member hunting and fishing as it sees fit. Enforcement of these regulations, however, must be accomplished without subjecting non-Indians to the criminal jurisdiction of the tribal courts.[14] Forfeiture of the arms or other property of non-Indians under *Quechan* constitutes an impermissible criminal san-

[14] We express no opinion with respect to whether non-member Indians are subject to the criminal jurisdiction of the Crow tribal courts.

ction. All other actions by tribal officials sanctioned by *Quechan* are available to aid the Tribe in enforcing its regulations. Fees, for example, may be imposed on non-members by the Tribe for the privilege of hunting and fishing on the Crow Reservation.

The State of Montana, as *Sanford* teaches, also retains the power to regulate hunting and fishing by those not members of the Crow Tribe within the limits of the Crow Reservation. While the State of Montana cannot require the Crows to admit non-members into the reservation for the purpose of hunting and fishing, non-members who do obtain such permission remain subject to Montana's fish and game laws while so hunting and fishing and, of course, are subject to tribal regulations as well. Thus, a non-member so hunting or fishing must obtain a proper license from the State of Montana as well as from the Crow Tribe. Fish and game limits imposed by the State remain applicable to non-members. Violators are subject to such civil and criminal penalties as the State imposes.

Dual regulation of hunting and fishing on Indian reservations is not unknown. *See Confederated Tribes of the Colville Indian Reservation v. Washington*, 591 F.2d 89 (9th Cir. 1979). In *Confederated Tribes* we described the role of the State of Washington under the structure of dual regulation. We there recognized as follows:

> The only authority claimed by the State is to impose upon non-Indians who wish to fish upon the reservation its licensing requirements and such of its statues and regulations as impose restrictions equal to or more restrictive than those that the Tribes apply to both Indians and non-Indians who fish on the reservation. The State does not claim that it can authorize fishing or fishing prac-

tices by non-Indians on the reservation that are prohibited by the Tribes' regulations.

591 F.2d at 92.

This substantially describes the State of Montana's effective role with respect to hunting and fishing by non-members on the Crow Reservation. As to such hunting and fishing the more severe restrictions, whether originating with the State or the Tribe, control.[15]

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[15] In *United States v. Sanford, supora*, 547 F.2d 1085, we held that Montana's game laws applied to the activities of non-Indians on Indian reservations. We predicated this holding on our conviction that "the application of Montana game laws to the activities of non-Indians on Indian reservations does not interfere with tribal self-government on reservations." 547 F.2d at 1089. In *Sanford*, however, we were not confronted with conflicting tribal and state regulations.

When both state and tribal fish and game regulations further the goal of maximizing the utility of fish and game resources, and when the state's regulations are more restrictive than the tribe's, a non-Indian who violates the state regulation on the reservation is subject to state law. Such exercise of jurisdiction by the state does not infringe upon the tribe's right to self-governemnt.

The decision in *Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Commission*, 588 F.2d 75 (4th Cir. 1978), is distinguishable. There, the circuit court held that North Carolina could not enforce its fishing licensing laws with respect to non-Indians fishing for trout in streams on the Band's reservation because such enforcement would violate the standard established in *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959), which stated that: "[A]bsent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." 358 U.s. at 220, 79 S.Ct. at 271. In the *North Carolina Wildlife Resources* case, the state imposed a license fee of $5.50, but the Band had a fee of only $2.00 and did not require non-members to have a state license in order to fish on the reservation. The court stated:

The strong federal policy supporting the Band 's fishing program and the significant federal efforts sustaining it demonstrate an intention to preclude state regulation of non-member fishing on the Band's reservation.

[The license requirement] also frustrates and impedes one major goal of tribal self-government, financial self-sufficiency . . .[It] would impair the Band's attempts to manage its own affairs by curbing its revenues and reducing the receipts of many of its members doing business with tourists. 588 F.2d at 78.

We recognize that dual regulation of non-member hunting and fishing requires cooperation between the State's enforcement, personnel and that of the Tribe. We believe that this will be forthcoming. Obviously the United States can and should contribute significantly in bringing about this cooperation. It is equally obvious that the State of Montana must promulgate and enforce its regulations in a manner that does not infringe "on the right of reservation Indians to make their own laws and be ruled by them." *See Williams v. Lee,* 358 U.S. 217, 220, 79 S.Ct. 269, 271, 3 L.Ed.2d 251 (1959). This means, *inter alia,* that Montana can neither regulate, directly nor indirectly, hunting and fishing by members of the Crow Tribe nor fashion its regulations of non-member hunting and fishing so as to discriminate against the Crow Tribe rather than to conserve the game and fish.

Our recognition of dual regulation of non-member hunting and fishing indicates that, as in *Confederated Tribes,* we find no "clear manifestation" of a congressional intent to preempt state regulation entirely. Nor would the adoption by the Crow Tribe of comprehensive regulations governing non-member hunting and fishing within the reservation "clearly manifest" such an intent. The Crow Tribe is neither the United States nor its Council the Congress thereof.

Regulation by the Crow Tribe of hunting and fishing by non-members who reside on fee patent lands located within the reservation requires special attention. As we held above, the Crow Tribe lacks the power to proscribe all hunting and fishing on fee

Central to the court's decision was its conclusion that North Carolina had "no possible interest . . . in this purely commercial undertaking." 588 F.2d at 79. In our case, however, Montana has a great interest in protecting the migratory game which pass over reservation lands.

patent lands by non-members who reside thereon. We now hold, however, that Congress did not intend by the applicable allotment acts to deprive the Tribe of all power to regulate such hunting and fishing. Regulation of hunting and fishing by non-members who reside on fee patent lands within the reservation, whether done on such lands or elsewhere within the reservation, must be reasonable, non-discriminatory, and consistent with sound principles of conservation. Within these limits such hunting and fishing may be regulated by the Crow Tribe.

IV.
A POSTSCRIPT

Our holdings reflect a degree of precision not always present in the sources on which we must rely. We recognize this. Our justification is that the problems this case presents are serious and require resolutions whose outlines are reasonably sharp and clear. While the judiciary is frequently not the institution of government best suited to frame such resolutions, its ability to intervene upon being invoked by the plaintiff in a lawsuit enables it to provide provisional relief when it is perceived that legislative or executive solutions are unlikely to be offered within the reasonable foreseeable future. This is precisely the situation we believe we confront in this case as well as in many other cases involving those responsibilities and necessities which this Nation confronts in dealing with Indians. Should we err in this belief, the events that demonstrate our error will also remove its harmful consequences. We, therefore, in this spirit reverse the judgment of the district court and remand this case to that court to enter a judgment that reflects our holdings.

REVERSED and REMANDED

OPINION ON PETITION FOR REHEARING

PER CURIAM:

Subsequent to the date our opinion was filed the Supreme Court rendered its decision in *Wilson v. Omaha Indian Tribe,* 47 U.S.L.W. 4758 (June 20, 1979.) The State of Montana in its petition for rehearing argued that *Wilson* required that Montana law be applied to determine the upper limit of the title to the bed and banks of the Big Horn. So applied, the State of Montana pointed out, would require that this limit be the low-water mark rather than the ordinary high water mark that we held was proper. In response to Montana's petition, the United States argued that federal common law determined the proper upper limit of the Big Horn bed and banks and that such common law should not borrow state law as its law as was done in *Wilson.* Under federal common law both the State of Montana and the United States agree that the bed and banks of the Big Horn would reach to the ordinary high water mark.

We confess to a certain amount of difficulty in determining the proper response to the State of Montana's argument. Under *Wilson* the adoption of state law as a part of federal common law requires considering

> . . . whether there is need for a nationally uniform body of law to apply in situations comparable to this, whether application of state law would frustrate federal policy or functions, and the impact a federal rule might have on existing relationships under state law.

We have considered these factors and have concluded, albeit less confidently than we would like, that state law should not be adopted as the federal

common law in this case.

Our consideration of whether a nationally uniform law is needed yields uncertainty. The United States argues that a nationally uniform rule is needed because of the vast amount of lands held in trust for Indians that it administers. We are not entirely convinced that these responsibilities necessitate rejection of *Wilson's* adoption of state law.

Such rejection, however, very well may prevent frustration of "federal policy and functions." We reach this conclusion because of the particular history of the allotments of riparian land on the Crow Reservation. Almost all such land, the United States asserts and the State of Montana does not deny, was initially allotted to Indians who, in some instances, later sold to non-Indians. Under these circumstances, it is natural to assume, the United States argues, that federal common law alone should fix the boundary between the bed and bank of the Big Horn River, which was held in trust for the Crow Tribe, and riparian land originally alloted to individual Indians. This argument has force.

> Many years ago this court observed:
>
> The general rule, of course, is that patents of the United States to lands bordering navigable waters, in the absence of special circumstances, convey only to high water mark.

Montana Power Co. v. Rochester, 127 F.2d 189 (9th Cir. 1942). We know of no reason why that principle was not applicable to the patents of the riparian land involved in this case. To adopt at this late date a different rule very likely would frustrate the intention of the United States in granting the patents. This can be described, we think, as frustration of "federal policy and functions."

Finally, we are not convinced that failing to adopt Montana law as federal common law will impact harmfully on existing relationships under state law. It is true it may have been thought by some riparians that the State of Montana owned the bed and banks of the Big Horn and that Montana law fixed the limits of riparian title. When the assumption regarding the title to the Big Horn is removed, however, there is much less reason to expect that state law will fix those limits. In any event, to assume that the State of Montana owned the bed and banks of the Big Horn was to assume something not then established by law.

On balance, therefore, we decline to alter the view we expressed in our original opinion, *viz.*, that title to the bed and banks of the Big Horn extends to the ordinary high water mark.

APPENDIX B

The UNITED STATES OF AMERICA, in its own right and as fiduciary on behalf of the Crow Tribe of Indians and the Crow Tribe of Indians, as interventors.

Plaintiffs

v.

The STATE OF MONTANA, Montana State Fish and Game Commission, WILLIS B. JONES, ARNOLD RIEDER, ARTHUR C. HAGENSTON, JOSEPH J. KLABUNDE, W. LESLIE PENGELLY, WESLEY R. WOODGERD, AND BIG HORN ROD and GUN CLUB and CITIZENS' RIGHTS ORGANIZATION, as intervenors,

Defendants

The STATE OF MONTANA, Montana State Fish and Game Commission, WILLIS B. JONES, ARNOLD RIEDER, ARTHUR C. HAGENSTON, JOSEPH J. KLABUNDE, W. LESLIE PENGELLY, and WESLEY R. WOODGERD, on behalf of themselves and on behalf of the citizens of the State of Montana and of the United States of America and the public and as representatives of all non-Crow Indian owners of real property within the Crow Indian Reservation, and Big Horn Rod and Gun Club and Citizens' Rights Organization, as intervenors,

Cross-Claimants

v.

The UNITED STATES OF AMERICA, in its own right and as fiduciary of the Crow Tribe of Indians, and the Crow Tribe of Indians,

Cross-Defendants

No. CV-75-105-BLG.
United States District Court,
D. Montana,
Billings, Division.
July 31, 1978.

The United States, in its own right and as fiduciary on behalf of the Crow Tribe of Indians sought to quiet title to the bed and banks of the Big Horn River. The District Court, Battin, J., held that: (1) the State of Montana owned the bed and banks of the Big Horn River and the same are not held in trust by the United States for the use and benefit of the Crow Tribe; (2) the State of Montana has authority to regulate hunting and fishing by non-Indians on the Crow Indian Reservation, and (3) Montana's regulation of hunting and fishing by non-Indian persons within the exterior boundaries of the Crow Indian Reservation was within its power and authority.

Declaratory judgment entered.

Steven E. Carroll, Dept. of Justice, Washington, D.C., for The United States.

Thomas J. Lynaugh, Thomas K. Schoppert, Lynaugh, Fitzgerald, Schoppert, Skaggs & Essman, Billings, Mont., R. Anthony Rogers, Charles A. Hobbs, Wilkinson, Cragun & Barker, Washington, D.C. for Crow Tribe of Indians.

Michael Greely, Atty. Gen., Helena Mont., Urban L. Roth, Sp. Asst. Atty. Gen., Butte, Mont., for the State of Montana.

Clayton R. Herron, Sp. Asst. Atty. Gen., Helena, Mont., for Fish and Game Commission.

Bert W. Kronmiller, James E. Seykora, Hardin, Mont., for Big Horn Rod and Gun Club.

Douglas Y. Freeman, Hardin, Mont., for Citizens'

Rights Organization.

OPINION

BATTIN, District Judge.

This case seeks to quiet title to the bed and banks of the Big Horn River. A corollary issue requires a determination of whether the State of Montana has the authority to regulate hunting and fishing within the exterior boundaries of the Crow Indian Reservation by non-Indian persons, since the Crow Tribe purportedly has an exclusive treaty right to reservation hunting and fishing. The final issue is whether the State of Montana, acting through the auspices of the State Fish and Game Department, is lawfully asserting authority to regulate hunting and fishing by non-Indian persons within the exterior boundaries of the Crow Indian Reservation.

The case was tried before the Court, sitting without a jury, on June 27, 1978. An extensive and laudatory record has been made. The Court, having considered the evidence adduced at trial, the testimony of the witnesses, and the exhaustive legal arguments presented by counsel for each of the parties, finds as follows:

(1) That the State of Montana owns the bed and banks of the Big Horn River and that the same are not held in trust by the United States of America for the use and benefits of the Crow Tribe of Indians. *United States v. Finch*, D.C., 395 F.Supp. 205 (1975);[1]

[1] *United States v. Finch*, D.C., 395 F. Supp. 205 (1975), wherein this Court declared that the Big Horn River belonged to the State of Montana, was subsequently reversed by the Ninth Circuit Court of Appeals. *United States v. Finch*, 548 F.2d 822 (9th Cir. 1972) sic (1976). However, the Ninth Circuit decision was thereafter vacated by the United States Supreme Court when that Court granted *certiorari*, reversed the Circuit Court decision on other grounds, and directed the Circuit to dismiss the appeal. 433 U. S. 676, 97 S.Ct. 2909, 53 L.Ed.2d

(2) The State of Montana has authority to regulate hunting and fishing, by non-Indians on the Crow Indian Reservation, and Montana's fish and game laws apply to such persons. *United States v. Sanford*, 547 F.2d 1089 (9th Cir. 1976);[2] and

(3) The State of Montana is properly acting within its power and authority in regulating hunting and fishing by non-Indian persons within the exterior boundaries of the Crow Indian Reservation.

I. JURISDICTION

Subject matter jurisdiction over this cause exists in the District Court by virtue of 28 U.S.C. §§ 1345 and 1362. Venue is proper, as all the defendants reside within the District. A case or controversy exists between each of the plaintiffs and each of the defendants as to the title to the bed and banks of the Big Horn River to the high water mark and as to which governmental entity has authority to regulate hunting and fishing within the exterior boundaries of the Reservation. The plaintiffs have no adequate remedy at law and are entitled to bring this action for declaratory relief.

1048. This Court does not feel bound by the Circuit's determinations in the *Finch* case, *supra*. The Circuit's decision in *United States v. Finch*, *supra*, may be an indication of how that Court would rule if there were an appeal in this case. However, I am confident that the Court of Appeals will find, on the record made here, that the bases for its earlier decision are not supported by the record.

[2] *United States v. Sanford*, 547 F.2d 1085 (9th Cir. 1976), is particularly appropriate to this issue, as the case involved the same Indian reservation. The Circuit adopted the reasoning of the Montana Supreme Court with respect to the regulation of hunting and fishing by non-Indians on the Crow Indian Reservation, and adopted the state court's reasoning in interpreting 18 U.S.C. § 1165. *See, State v. Danielson*, 149 Mont. 438, 427 P.2d 689 (1967). *Accord, The White Mountain Apache Tribe v. The State of Arizona, Dept. of Fish and Game, et al.* (No. Civ. 77—867, PHX WPC, June 13, 1978).

II. FACTS

The history and negotiations of the treaties which are considered in this action were discussed in detail by the Court of Claims in the case of the *Crow Tribe of Indians v. United States,* 284 F.2d 361, 151 Ct.Cl. 281 (1960); *Crow Nation v. United States,* 81 Ct.Cl. 238 (1935); and *Fort Berthold Tribe of Indians v. United States,* 71 Ct. Cl. 308 (1930). Thus, it is unnecessary to elaborately discuss the treaty background and the history need not exhaustively be repeated here. It is necessary as a preliminary matter to extract from the record the factual basis upon which the Court has determined the ownership of the bed and banks of the Big Horn River.

The present Crow Indian Reservation is part of a large tract recognized as Crow lands by the Treaty of Fort Laramie of 1851, 11 Stat. 749, 2 C. Kappler, *Indian Affairs: Laws and Treaties* 594 (hereinafter cited as "Kapp."). The treaty with the Crows of 1868, 15 Stat. 649, 2 Kapp. 1008, carved out from the 1851 territory a reservation of some 8,000,000 acres for the Crow Indians. The Reservation was further diminished in size by subsequent Acts of the Congress, *see,* 22 Stat. 42 (1882); 26 Stat. 989 (1891); 33 Stat. 352 (1904); 50 Stat. 884 (1937).[3]

The Big Horn River is a navigable water-course which traverses the heart of the Crow Indian Reservation from south to north. Prior to 1851, the United States owned the bed of the Big Horn River. The United States retained the ownership of the bed of the Big Horn River as public lands, during the time it entered into the treaties with the Crow Nation. Because it so retained the bed, the bed and the river passed to the State of Montana upon Montana's ad-

[3] *See,* the maps reproduced in *United States v. Finch,* 395 F.Supp. 205, at 215—220 (D. Mont. 1975).

mission to the Union.

The Crow Tribe of Indians is not indigenous historically to either Montana or Wyoming. The roots of this nomadic people were formed in Canada near the Winnepeg Lake area. Initially, migration took the Crow, also know as the Absorkas, to an area on the Missouri River now encompassed by the Dakotas, where the Crow joined the Mandan. Ultimately, the Crow and the Mandan quarreled and the Crow once again migrated until their meandering was impeded by the main range of the Rocky Mountains. The later migration of the Crow Nation occurred around the time the dominant society was migrating from the old world to the new world. The Crow occupancy of the land now constituting the Crow Indian Reservation is not based upon aboriginal title from time immemorial.

While the Crow Indians did not have a written language, an extensive vocabulary did exist. The language had words for hunting, fishing, elk, deer, trout, and other types of animals and fish. The language was sophisticated in the sense that significant semantical distinctions existed. The vocabulary distinguished between "rights" and "privileges."

The Crow Nation was largely dependent upon big game animals or agriculture for subsistence. The first written reference to fishing and the Crow Indians came about at a council meeting between the Crow Tribe and the Federal Government, which resulted in a further cession of the Reservation. Act of April 11, 1882, 22 Stat. 42. The evidence adduced at trial indicates that fishing was not a central part of the Crow diet. The Crow were not dependent upon canoes or other types of boats for transportation along the Big Horn River or other rivers and streams

flowing through their country.

III. TREATIES

The first contact the United States recorded in its relations with the Crow resulted in the Treaty of Friendship with the Crow Tribe in 1825. 7 Stat. 266. That treaty made no reservations of land to the Crow.

The next treaty was approved by the Senate on May 24, 1852, but is referred to as the Treaty of 1851. The Crow did not assent to this treaty until September 18, 1854.[4] The Treaty of Fort Laramie created a reservation encompassing some 38,531,174 acres. After the Treaty of Forty Laramie, the inevitable course of reservation diminishment followed.

On May 7, 1868, the Second Treaty of Fort Laramie was signed and proclaimed by the President on August 12, 1868. 15 Stat. 649. The Treaty diminished the reservation by over 30,000,000 acres. The net result of the 1868 Treaty was a reservation to the Crow of approximately 8,000,000 acres. Subsequent Congressional Acts reduced the size of the Crow Reservation to its present acreage of approximately 2,282,764.0 acres.[5] Of the 2,282,764 acres of reservation land that remain, the ownership can be broken down as follows:

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[4] Treaty of Fort Laramie, 11 Stat. 749; *Crow Nation v. United States*, 81 Ct.Cl. 238, 248 (1935).

[5] *See*, 22 Stat. 42 (1882); 26 Stat. 989 (1891); 33 Stat. 352 (1904); 50 Stat. 884 (1937). *See also, Rosebud Sioux Tribe v. Kneip*, 430 U. S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977); *DeCoteau v. District County Court*, 420 U. S.425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1973); *Mattz v. Arnett*, 412 U.S. 481, 93 S.Ct. 2245, 37 L. Ed.2d 92 (1973); *Seymour v. Superintendent*, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962).

Type of Ownership	Acreage	Percentage of Ownership to Total Acreage
Allotted	1,187,592.34	52.02%
Tribal	379,740.64	16.64%
(Surveyed) Tribal	15,850.85	.69%
(Unsurveyed)	395,591.49	
Government Owned	1,400.50	.07%
Yellowtail Dam	6,695.64	.29%
State Lands	44,804.82	1.96%
Fee Lands	646,679.12	28.33%
TOTAL:	2,282,764.00	100.00%

The only reference the 1851 Treaty makes to hunting and fishing is in Article 5, which provided that the eight Indian nations "do not surrender the *privilege* of hunting, fishing, or passing over any of the tracts of country heretofore described." (Emphasis supplied.) Likewise, the Treaty of 1868 makes but one reference to hunting and fishing rights. That is in Article 4 of the Treaty of 1868. Neither the Treaty of Fort Laramie of 1851 nor the Treaty of the Crow Indians of 1868 made specific reference to the title of the Big Horn River and its bed.

> Article 1 of the Treaty of 1868 provided: If bad men among the whites or among other people, subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained. If bad

men among the Indians shall commit a wrong or depridation upon the person or property of anyone, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Indians herein named solemnly agree that they will, and proof made to their agent and noticed by him, deliver up the wrong-doer to the United States, to be tried and punished according to its laws;

The reservation was described in Article 2 as that place "set apart for the absolute and undisturbed use and occupation of the Indians." Article 4 of the Treaty provides the touchstone for the claims of the Crow Tribe. It references the rights of the Indians in that they "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts."

IV. STATUTES

The General Allotment Act of 1887 and the Crow Allotment Act of 1920 specifically provided that patents in fee could be issued by the United States to allottees within the Crow Indian Reservation and thus be subject to alienation to non-Indians. This provision exists despite the language of Article 2 of the 1868 Treaty, which provided:

No persons, except those herein designated and authorized so to do, and except such officers, agents, and employees of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians, and henceforth, they

> will, and do hereby, relinquish all title, claim or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid . . .

An examination of the treaties together with the relevant statutes reveals the vacillating policy of the United States, evident at the time.[6] The allotment system was intended to integrate the Indian into the white communities and was unilaterally imposed upon the Crow. This integration purpose is apparent in the Crow Allotment Act of 1920.[7] The Crow territory was part of the Louisiana Purchase. Both the Courts and the Congress have recognized that the object of the Louisiana Treaty was to acquire land for the formation of new states.[8] The Nebraska territory was created on May 30, 1854, and the Crow cession in the present state of Montana was included in the Dakota Territory, carved out of the Nebraska Territory on March 1, 1861. Thereafter, the Territory of Idaho was created from Eastern Washington and Western Dakota and included all of the land which now constitutes Montana. On January 16, 1864, the Territory of Idaho established what are presently the Montana counties of Missoula, Deer Lodge, Dawson, Beaverhead, Madison, Jefferson, Choteau, and Big Horn. These counties were immediately adopted as Montana counties at the Territorial Assembly at

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[6] Joe Medicine Crow, the Tribal Historian, testified that the Crow have followed agrarian pursuits intermittently for the last four centuries. *See also,* Articles 3, 6, 8, 9 and 10 of the treaty.

[7] The allotment philosophy was terminated in large part by the Indian Reorganization Act of 1934.

[8] *United States v. Brewer-Elliott Oil & Gas Co.* (D.C.Okl.), 249 F. 609, *aff'd* 8 Cir., 270 F. 100, *aff'd* 260 U.S. 77, 43 S.Ct. 60, 67 L.Ed. 140 (1922); 20 Cong.Rec., House, 815; *see also,* S.R. 75, January 23, 1888, H.R. 1025, March 13, 1888.

Bannock on December 12, 1864. The Territorial Government, meeting after the creation of the Montana Territory, adopted the acts of the Idaho Territorial Legislature. Although the Congress nullified the original acts, they were recreated by the Legislature of 1867. Thus on the date of May 7, 1868, the date of the Treaty of the Crow Cession, the Territory of Montana was located in Big Horn, Gallatin, Meagher, and Musselshell Counties.

The Organic Act of the Territory of Montana provided:

> That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said territory so long as such rights remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribes, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the territory of Montana, until said tribe shall signify their assent to the president of the United States to be included within said territory, or to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property, or otherwise, which it would have been competent for the government to make if this act had never passed.
>
> Act of May 26, 1864, 13 Stat. 85.

Neither the Treaty of 1851, nor the Treaty of 1868 conferred upon the Tribe the right to exclude the Crow Reservation from the Montana Territory.

Montana's Enabling Act substantially changed the language of the Organic Act of the Territory:

> That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States; . . .
>
> Act of February 22, 1889, 25 Stat. 676.

V. FISH AND GAME MANAGEMENT

On March 27, 1970, the Crow Tribe and the Bureau of Sports Fisheries and Wildlife, a federal agency, entered an agreement which provided that the Bureau would give technical assistance in the management of fishing resources on the Crow Reservation and would stock the waters of the Big Horn River and the Big Horn Canyon Recreation Area. To assist in the implementation of this plan, the Crow Tribal Council on June 20, 1970, enacted Resolution No. 70-51, which directed the Tribal officers to enter the agreement with the Bureau of Sports Fisheries and Wildlife "for the purpose of providing the Crow Tribe with fish and wildlife and the planting stock required. . . ."[9] The Fisheries management by the United States Fish and Wildlife Service actually

[9] For a discussion of the relevant background of the Crow Tribal Government, *see, Stands Over Bull v. Bureau of Indian Affairs*, 442 F.Supp. 360 (D. Mont. 1977), *aff'd* (9th Cir., May 22, 1978), vacated in part 578 F.2d 799 (9th Cir. 1978).

began on the Crow Reservation in 1964. However, a Fisheries biologist was not assigned to the reservation area until 1973, when management assistance was provided to three eastern Montana Indian reservations with special emphasis on the Crow Reservation.

On the other hand, the State of Montana has, since at least 1928, engaged in an extensive fish-stocking program throughout the waters of the Crow Indian Reservation. The plantings started in 1928 and continued up to the present time. Additionally, the State Department of Fish and Game has conducted extensive game, fishery and fowl studies on the Big Horn River without objection by either the Tribe or the Bureau of Indian Affairs. The Montana Department of Fish and Game introduced the Brown and the Rainbow Trout to the Big Horn, the Little Big Horn, and other reservation streams.

The reservation is a haven for upland gamebirds. The ringnecked pheasant, wild turkey, and Hungarian partridge, none of them indigenous to the area, were introduced by either non-Indian organizations or the Montana Department of Fish and Game. The State Department has also stocked game animals in areas adjacent to the reservation, these animals having migrated to the tribal mountain areas where they have been hunted and killed by Indian hunters.

This factual background does not substaniate either directly or by negative inference the claims of the Crow Tribe that it owns the Big Horn River and has power and authority to regulate hunting and fishing by non-Indians on reservation lands. Significantly, neither of the treaties considered contains an express grant of all land including the beds of navigable streams contained within the territorial

boundaries of the land in question.

VI. DISCUSSION

A. *The River.*

The first determination which must be made is whether the bed of the Big Horn River, within the exterior boundaries of the Crow Indian Reservation, is land held by the United States in trust for the use and benefit of the Crow Tribe, or whether it is land to which the title passed to the State of Montana upon its admission to the Union. As has been previously noted, the Big Horn River is a navigable watercourse which flows through the Crow Reservation from south to north. The United States either transferred beneficial ownership of the bed to the Crow Tribe by the Treaties of 1851 and 1868, or it retained ownership of the bed as public lands which passed to the State of Montana upon its admission to the Union. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 627-628, 90 S.Ct. 1328, 25 L.Ed.2d 615 (1969).

The disposition of this case depends upon which alternative the Governmenmt followed when it signed the treaties. The analysis of this issue must be presented in the context of, and is controlled by, the opinions of the United States Supreme Court in two cases ruling on the title to lands underlying navigable waters situated in Indian territory: *United States v. Holt State Bank*, 270 U.S. 49, 46 S.Ct. 197, 70 L.Ed. 465 (1926), and *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 90 S.Ct. 1328, 25 L.Ed.2d 615 (1969). The application of these precedents requires a delicate balance.

Early on, it was determined that a disposition by the United States of public lands bordering upon navigable waters, as a general rule, does not convey

title or dominion to the land situated below high water mark. *Shively v. Bowlby,* 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1893). In *Shively,* the United States had granted land adjacent to the Columbia River to a private party pursuant to the Oregon Donation Act, 9 Stat. 496. The Supreme Court held that absent the clearest expression of the intent to the contrary, it would not presume that the United States intended to divest itself of part of the river bed. The Court stated:

> The United States, while they hold the country as a territory, having all the powers both of national and of municipal governmement, may grant, for appropriate purposes, titles or rights in the soil below high-water mark of tide waters. But they have never done so by general laws; and, unless in some case of international duty or public exigency, have acted upon the policy, as most in accordance with the interest of the people and with the object for which the territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the states, respectively, when organized and admitted into the Union. *Shively v. Bowlby,* 152 U.S. at 58, 14 S.Ct. at 569.

The principle enunciated in *Shively, supra,* was applied to transfers of land involving Indian tribes by the Supreme Court in the case of *United States v. Holt State Bank, supra.*

In *Holt State Bank,* the dispute concerned ownership of the bed of Mud Lake, a body of water lying wholly within the exterior boundaries of the Red Lake Indian Reservation in Minnesota. By treaties enacted before Minnesota was admitted into the Union, the government had recognized the right of

the Chippewa Indians to occupy the reservation. When the treaties were signed, Mud Lake was a navigable body of water. The last treaties preceding Minnesota's statehood were concluded September 30, 1854, 10 Stat. 1109, 2 Kapp. 648, and February 22, 1855, 10 Stat. 1165, 2 Kapp. 685. There was nothing in the language of the treaties, or in the background of treaty negotiations, which prompted the Court to find an express intent by the United States to dispose of the land underlying the lake. Both the Treaty of 1854 and the Treaty of 1855 provided for the cession by the Chippewa to the United States of their claimed aboriginal right to occupy certain lands. In return for that cession, the government recognized that the Chippewa had rights in the land constituting the reservation. By the Treaty of 1854, the United States did state that certain tracts of land would be "set apart and withheld from sale, for the use of the Chippewa," Article 2, 2 Kapp. 648; and the Treaty of 1855 provided that a sufficient quantity of land "be reserved and set apart . . . for the permanent home of the said Indians" within designated locations. Article 2, 2 Kapp. 685, 686. However, there was no express provision guaranteeing to the Indians exclusive possession of the tracts in either treaty. Equally significant, there were no assurances given by the United States that the lands would ever be put to any other use. The Supreme Court noted the effect of the treaties in finding that

> [t]here was no formal setting apart of what was not ceded, nor any affirmative declaration of the rights of the Indians therein, nor any attempted exclusion of others from the use of navigable waters. The effect of what was done was to reserve in a general way for the continued occupation

> of the Indians what remained of their aboriginal territory; and thus it came to be known and recognized as a reservation. *Minnesota v. Hitchcock,* 285 U.S. 373, 389 [22 S.Ct. 650, 46 L.Ed. 954]. There was nothing in this which even approaches a grant of rights in lands underlying navigable waters; nor anything evincing a purpose to depart from the established policy, before stated, of treating such lands as held for the benefit of the future State.
>
> *United States v. Holt State Bank,* 270 U.S. at 58-59, 46 S.Ct. at 200.

The Court followed the rule announced in *Shively* and held that title to and dominion of the lake bed remained vested in the national government and that ownership of the bed passed to the State of Minnesota on its admission to the Union.

The second principal authority which establishes the dichotomy considered here is the case of *Choctaw Nation v. Oklahoma, supra.* The Court in *Choctaw Nation* adressed an issue similar to that raised by the *Holt State Bank* case. After examining treaty grants made under different circumstances in *Choctaw Nation,* the Court reached a different conclusion as to the ownership of lands underlying navigable waters of the Arkansas River.

A series of treaties had provided for the relocation of the Choctaw and Cherokee Tribes, but the lands therein set aside were settled before the Indians could be relocated. Even so, the national and state governments exerted pressure on the Indians to move when voluntary removal failed.

As a guarantee that they would not again be forced to move, the United States promised to convey that land to the Choctaw Nation in fee simple "to insure

to them while they shall exist as a nation and live on it."

Choctaw Nation v. Oklahoma, 397 U.S. at 625, 90 S.Ct. at 1331.

Similar promises were made to the Cherokee. the *Holt State Bank* case was found to be inapplicable to the *Choctaw Nation* facts, and the Court accordingly held that the bed of the Arkansas River was held by the Indian tribes. The decision in *Cherokee Nation* was based on the forced movement of the Cherokee and Choctaw Tribes, taken together with the axiom of resolving well-founded doubts in favor of the Indian tribes. The net result overcame the presumption that the United States retained ownership of the river bed.

[1,2] With this factual and legal background, it is necessary to examine the case at hand. However, before indulging in such analysis, it is helpful to reiterate some of the presumptions upon which Indian cases are based. Treaties with the Indians must be interpreted as the Indians would have understood them, and Indian treaties are to be construed in favor of the Indians. *Choctaw Nation v. Oklahoma, supra.* Concomitantly, doubtful expressions are to be resolved in favor of the Indian parties to the treaty. *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973); *Carpenter v. Shaw*, 280 U.S. 363, 50 S.Ct. 121, 74 L.Ed. 478 (1930). Treaty and statutory provisions which are not clear on their face may "be clear from the surrounding circumstances and legislative history." *Cf. DeCoteau v. District Court*, 420 U.S. 425, 444, 95 S.Ct. 1082. 1093, 43 L.Ed.2d 300 (1975). Finally, there is the presumption that the United States does not intend to divest itself of the

sovereign rights in navigable waters, and in the soil under them, absent the clearest expression of intent to the contrary. *Shively v. Bowlby, supra* at 58; *United States v. Holt State Bank, supra.*

[3] Neither the Treaty of Fort Laramie of 1851 nor the Treaty of the Crow Indians of 1868 made specific reference to the title of the Big Horn River bed, a navigable stream. This case is similar in some respects to the *Choctaw Nation* case in the series of treaties involved. However, unlike the Crow Indians, the Choctaw Indians were forced to leave their aboriginal lands and the United States promised to convey different land to the Choctaw Nation in fee simple. Such a conveyance did not occur with respect to the Crow Indian Reservation. The aboriginal ownership of the Crow to the lands reserved for them is more akin to the facts presented in *Holt State Bank, supra,* even though such aboriginal title did not stem from time immemorial. The grant to the Choctaw and Cherokee indicated that no territory or state shall ever have the right to pass laws for the government of the Choctaw Nation and that no part of the land granted to them would ever be embraced in any territory or state. *See, Choctaw Nation, supra,* 397 U.S. at 625, 90 S.Ct. 1328. The treaties with the Crow Tribe do not reflect such a provision, explicitly exempting the Crow lands from ever being embraced in any territory or state. The treaties, the evidence, and the arguments presented in this case involving the Crow Indian Reservation, in particular the title to the bed and banks of the Big Horn River, most closely approximate those in the *Holt State Bank* case, *supra,* and not those in the *Choctaw Nation* case. Such analysis compels the conclusion that the bed and banks of the Big Horn River passed to the State of Montana upon its admission to the Union.

United States v. Finch, 395 F.Supp. 205, 210 (D.Mont. 1975).

B. *Hunting and Fishing.*

[4,5] The Treaty of Fort Laramie of 1851 provides in Article 5 that the Indian tribes mentioned in the treaty did not surrender their *privileges* of hunting and fishing by accepting the respective reservations, but rather that they maintained such rights as well as the right to pass over any of the tracts of land described in the treaty for the purpose of hunting and fishing.

The Treaty with the Crow Indians, dated May 7, 1868, does not contain any reference to fishing. The retention by the tribes of the privilege of fishing does not carry with it as a matter of law, nor does it grant, the exclusive right to fish. Had the exclusive *right* to fish been deemed salient to the Crow, and it was not, based upon the record which is before the Court, surely it would have been mentioned in the treaties. This is especially so when it is considered that the Absorka or Crow language distinguished between privileges and rights. A treaty of similar vintage in this state provided for the exclusive right of taking fish. *See*, the Hellgate Treaty, 12 Stat. 975, with the Flathead, Kootenai, and other Pend Oreille Indians, Article 3. With this in mind, and considering the conclusions of the United States Supreme Court in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978), it is apparent that the State of Montana has exclusive jurisdiction to regulate nonmember hunting and fishing within the exterior boundaries of the Crow Indian Reservation.

The issue has previously been considered by the Court of Appeals for the Ninth Circuit in the case of

United States v. Sanford, 547 F.2d 1085 (9th Cir. 1976).[10]

The *Sanford* case was a criminal case involving hunting by non-Indians on the Crow Indian Reservation, in violation of the laws of the United States and the laws of the State of Montana. The Sanfords were big game hunters and outfitters in Montana. After some preliminary arrangements with out-of-state hunters, who, unbeknownst to the Sanfords, were acting as agents of the Bureau of Sport Fisheries and Wildlife, a hunt into the Crow Indian Reservation was arranged. The party made their kill, took the cape of the elk, and went from the reservation to Wyoming. A second hunt was planned, and again the Sanfords and their hunters penetrated the exterior boundaries of the Crow Indian Reservation. A second elk was shot and killed; the animal was caped and the party left the reservation. The party next sojourned to hunt for Rocky Mountain Big Horn Sheep within Yellowstone National Park, but that hunt is not relevant to the issue considered here.

A seven-count indictment was returned against the Sanfords. Count II of the indictment charged two of the Sanfords with illegal entry on the Crow Indian Reservation, in violation of 18 U.S. C. § 1165. A third Sanford was similarly charged with the same offense but on a different day. The Ninth Circuit's instruction with respect to these counts is relevant to the case at hand. In *Sanford*, the government had

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[10] In *Quechan Tribe of Indians v. Rowe*, 531 F.2d 408 (9th Cir. 1976), decided prior to *Oliphant v. Suquamish*, and *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978), which involved a different Indian reservation than the Crow Reservation, a contrary conclusion was reached to that reached in *United States v. Sanford*, *supra*. *See also*, *The White Mountain Apache Tribe v. State of Arizona, et al.*, *supra* n. 2.

argued that 18 U.S.C. § 1165 makes illegal the unauthorized killing of wildlife on Indian reservations. The Circuit found the contention to be ill taken, relying on the reasoning of the Montana Supreme Court in *State v. Danielson*,. 149 Mont. 438, 427 P.2d 689 (1967), in reaching conclusion. Quoting the state decision:

> *It is significant to note that § 1165 does not directly prohibit hunting and fishing but makes the act of going upon the Indian reservation a violation if done for the purpose of hunting or fishing*. . . [S]ection 1165 must be considered to be a statute providing a penalty for trespass to an Indian reservation and not an attempt by Congress to enter the field of fish and game regulation.
>
> *State v. Danielson, supra* at 691.

In *Sanford*, the government also argued that the elk which were killed on the Indian reservation were killed in violation of the Montana Fish and Game Law, R.C.M. § 26—307(3). The argument required consideration of the preliminary issue of whether or not Montana game laws applied to the activities of non-Indians on Indian reservations. The Circuit Court held that they do. This conclusion was predicated up the Montana Supreme Court's statement in *Danielson, supra.* wherein it noted that:

> [T]he State of Montana has jurisdiction to enforce its fish and game regulations on Indian reservations contained within its boundaries with respect to persons who are not tribal Indians unless precluded from doing so by an act of Congress or unless such enforcement would interfere with self-government on the reservation. *State v. Danielson*, 427 P.2d at 692-693.

[6] A paramount consideration in the *Sanford* case is that 18 U.S.C. § 1165 does not represent an attempt by the federal government to enter the arena of fish and game regulation on the Crow Indian Reservation or on any other Indian reservation. After making this observation, the Circuit noted:

> Further, we are convinced that the application of Montana game laws to the activities of non-Indians on Indian reservations does not interfere with tribal self-government on reservations. We express no opinion concerning the possible concurrent application of tribal law to non-Indians on Indian reservations under the circumstances of this case.
>
> *United States v. Sanford*, 547 F2d at 1089.

The regulation of hunting and fishing by non-Indians within the exterior boundaries of the Crow Indian Reservation does not conflict with an act or treaty of the Congress. Nor does it interfere with tribal self-government on the Crow Reservation. Montana long ago enacted a comprehensive fish and game code. See, § 26—101.1 *et seq.*, R.C.M.1947. The State of Montana does not generally enforce its hunting and fishing laws agrainst members of the Crow Tribe.[11] The Crow Reservation is regularly patrolled by game wardens employed by the Department of Fish and Game. Non-Indians are subjected to enforcement of the State's laws while they are within the exterior boundaries of the Reservation. Ultimately, the State is enfranchised to exercise its regulatory power over non-Indians on the Crow Reservation as an extension of its police powers over all land within its borders, regardless of title. *Cf. The White Mountain Apache*

[11] There was testimony presented at trial that enrolled members had, on occasion, been charged and tried for fish and game violations on fee land within the reservation.

Tribe v. State of Arizona, et al. (No. Civ. 77-867 PHX, WPC, June 13, 1978). The State's statutory and regulatory scheme does not limit what the Tribe may prohibit with respect to hunting and fishing on tribal lands; it merely provides the conduit for enforcing the State's police power within its territory where non-Indians are involved.

The question upon which the Ninth Circuit expressed no opinion has apparently been resolved in the recent case of the United States Supreme Court, *Oliphant v. Suquamish Indian Tribe, supra.* The Court granted *certiorari* in *Oliphant,* 431 U.S. 964, 97 S.Ct. 2919, 53 L.Ed.2d 1059, to decide whether or not Indian tribal courts had criminal jurisdiction over non-Indians. It found they do not. Implicit in the Supreme Court's decision in *Oliphant* is the recognition that Indian tribes do not have the power, nor do they have the authority, to regulate non-Indians unless so granted by an act of Congress. The Court noted that from the earliest treaties with many tribes, it has been presumed that the tribes did not have criminal jurisdiction over non-Indians absent a Congressional statute or treaty provision to that effect. *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209. In discussing the various attempts to deal with the problem by the United States Congress, the Court noted that

> Congress' concern over criminal jurisdiction in this proposed Indian Territory contrasts markedly with its total failure to address criminal jurisdiction over non-Indians on other reservations, which frequently bordered non-Indian settlements. The contrast suggests that Congress shared the view of the Executive Branch and lower federal courts that Indian tribal courts were without

jurisdiction to try non-Indians.

Oliphant v. Suquamish, supra at 203, 98 S.Ct. at 1018.

While the Supreme Court did not find conclusive the commonly-shared presumption of the Congress, the Executive Branch, and the lower federal courts that tribal courts do not have power to try a non-Indian, it found the presumption to carry considerable weight. *Oliphant v. Suquamish Indian Tribe, supra* at 206, 98 S.Ct. 1011. Ultimately, the Court concluded:

. . . Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress.

Oliphant v. Suquamish Indian Tribe, supra at 208, 98 S.Ct. at 1020.

Indian tribes cannot exercise both "those powers of autonomous states that are expressly terminated by Congress and those powers 'inconsistent with their status.' "

Oliphant v. Suquamish.

By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citrizens of the United States except in a manner acceptable to Congress. [Quoting the 9th Circuit at 544 F.2d 1007, 1009.]

Oliphant v. Suquamish, supra at 210, 98 S.Ct. at 1021.

[7] In the case at hand, the Crow Tribe has not been given an express delegation of the power to try non-Indians on the Crow Reservation. Nor was that power specifically retained in the tribe by the course of the Treaties of 1851 and 1868 and subsequent acts dealing with the Crow Tribe. The tribe cannot

preempt a power which rests with the state government simply by enacting an ordinance inconsistent with the power and authority of the state, and consistent with tribal self-government, absent the authority of Congress. *See, Fisher v. District Court,* 424 U.S. 382, 96 S.Ct. 943, 47 L.Ed.2d 106 (1976); *United States v. Mazurie,* 419 U.S. 544, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975). The Congress, in the dealings between states and Indian tribes, is the source of power to preempt state activity within the exterior boundaries of the Indian reservations.

The United States and the Crow Tribe have attempted to show in the trial of this case that the Tribe has continually exercised jurisdiction over hunting and fishing activities on the reservation. However, the preponderance of evidence supports a contrary conclusion. In matters of law enforcement involving non-Indians within the exterior boundaries of the Crow Indian Reservation, the Big Horn County Attorney has exercised near exclusive jurisdiction in prosecuting for offenses committed on fee land within the confines of the reservation. The Montana Department of Fish and Game wardens have patrolled the reservation and have cited on numerous occasions non-Indians for fish and game violations, whether the violations transpired on tribal, trust, or fee lands. Until approximately 1973, there was no real confrontation on the Crow Reservation regarding jurisdiction over non-Indians. The Tribe has from time to time been dissatisfied with the enforcement procedures involving nonmember hunting and fishing within the reservation; however, all parties understood that non-member hunting and fishing regulation was a power belonging to the state. Where nonmembers violated fish and game laws, the jurisdictional boundaries for dealing with

such cases were reduced to the following scheme: Montana exercised exclusive jurisdiction over nonmenber hunting and fishing on fee patent land within the confines of the reservation. The federal government exercised concurrent jurisdiction, with the state, over nonmember fishing and hunting when such fishing and hunting was done without permission on tribal or trust property. The Crow Tribe neither had nor did it exercise jurisdiction over nonmember fishing and hunting activities within the reservation. The exception to the Tribe's attempt to exercise jurisdiction over non-Indian hunting and fishing is revealed in Tribal Resolution No. 74-05, passed by the Tribal Council in 1973, and Tribal Ordinance No. 1, enacted April 12, 1975. These acts of the Tribe proscribed all nonmembers from fishing or hunting within the boundaries of the Crow Reservation. However, subsequent case law teaches that this attempted exercise of jurisdiction over non-Indians was fatally doomed.

VII. CONCLUSION

[8, 9] The common understanding of the various governmental entities involved was implicitly correct in the allocation of jurisdictional responsibility, considered in light of the *Sanford* decision, *supra*, and the United States Supreme Court's decision in *Oliphant*. The State of Montana has exclusive jurisdiction to regulate non-members hunting and fishing within the exterior boundaries of the Crow Indian Reservation on fee lands. The State of Montana and the United States Government have con-

current jurisdiction to regulate non-member hunting and fishing within the Crow Indian Reservation on tribal land or trust properties when the same transpire without the permission of the respective landowners. Finally, the Crow Tribe does not have jurisdiction over non-Indians' hunting and fishing activities within the Crow Reservation. As the Supreme Court in *Oliphant* noted:

> Indian tribes do not have inherent jurisdiction to try and punish non-Indians.

The Tribe's authority with respect to non-Indian hunters and fishermen is limited, absent an act of Congress, to authorizing non-members to trespass on tribal and allotted lands within the reservation for purposes of hunting and fishing. To paraphrase Judge Smith of this Court, the Crow Tribe has as much authority to regulate non-Indian activities within the exterior boundaries of the Crow Reservation as the Congress says it has.

The record does not reflect any treaty or act of Congress which gives the Crow Tribe the power it seeks to exercise.

From the foregoing, I make the following Declaration and Judgment:

1. That the title to the bed and banks of the Big Horn River to the high water mark is quieted in the State of Montana, and was so granted upon the State's admission to the Union.

2. That the State of Montana has exclusive jurisdiction to regulate non-Indian hunting and fishing activities on the Big Horn River and all patented land owned by non-Indians within the exterior boundaries of the Crow Indian Reservation.

3. That the State of Montana has concurrent jurisdiction with the United States to regulate non-Indian hunting and fishing activities on tribal or In-

dian lands if such activities are in violation of state law. The concurrent jurisdiction of the United States to so regulate non-Indian activities is predicated upon 18 U.S.C. § 1165.

4. The Crow Indian Tribe's exclusive rights of hunting and fishing within the exterior boundaries of the Crow Indian Reservation are limited to those lands set forth in 18 U.S.C. § 1165.

5. The Crow Indian Tribe has no authority to regulate non-Indian hunting and fishing activities within the exterior boundaries of the Crow Indian Reservation, save in granting permission to non-Indians to trespass on tribal or Indians lands for the purpose of hunting and fishing.

Pursuant to Rule 52(a), Federal Rules of Civil Procedure, this Opinion shall constitute the Court's Findings of Facts and Conclusions of Law. The Clerk is directed to enter, by separate document, a judgment consistent with the declarations set forth herein.

APPENDIX C

UNITED STATES of America,
Plaintiff-Appellant,

v.

James Junior FINCH,
Defendant-Appellee

No. 75-2149
United States Court of Appeals,
Ninth Circuit.

Dec. 22, 1976.

Rehearing En Banc Denied
March 3, 1977.

The United States appealed from an order of the United States District Court for the District of Montana, 395 F.Supp. 205, James F. Battin, J., dismissing information charging nontribal member with trespassing on Indian lands when he fished on the banks of the Big Horn river within exterior boundaries of Crow Reservation, which had enacted tribal ordinance prohibiting nontribal members from entering reservation for fishing or hunting. The Court of Appeals, Kennedy, Circuit Judge, held that notwithstanding the submission of an agreed statement of facts prior to district court's reconsideration of earlier motion and determination to dismiss information, remand would not subject defendant to double jeopardy, so that Court of Appeals had appellate jurisdiction; that bed of Big Horn river within confines of reservation is held by United States in trust for Indian tribe, and that defendant violated statute by willfully and

knowingly fishing without lawful authority or permission of tribe.

Keith L. Burrowes, Asst. U. S. Atty. (argued), Billings, Mont., for plaintiff-appellant.

Robert W. Holmstrom (argued), of Longan & Holmstrom, Billings, Mont., for defendant-appellee.

Before CHAMBERS and KENNEDY, Circuit Judges, and WONG,* District Judge.

KENNEDY, Circuit Judge:

This case began when James Junior Finch stood on a bank of the Big Horn River and cast a fishing lure into the waters. He was charged by information with trespassing on Indian lands, a violation of 18 U.S.C. § 1165. The bank and the bed of the Big Horn River at the point where Finch stood lie within the exterior boundaries of the Crow Indian Reservation. All concede that the State of Montana owns the bank at that spot, having acquired the property by purchase. The state's chain of title can be traced to a Crow Indian who acquired the land by allotment.

Finch held a fishing license issued by the Montana State Fish and Game Commission. However, he was not a member of the Crow Tribe, and he was well aware of an ordinance promulgated by the tribe that forbade all persons who were not tribal members from entering Crow lands for fishing. The district court found that no entry had been made on Indian land and dismissed the information. 395 F.Supp. 205 (D.Mont. 1975). The Government appeals.[1]

*Honorable Dick Yin Wong, United States District Judge for the District of Hawaii, sitting by designation.

[1] While this controversy is between the United States and appellee Finch, the Crow Tribe and the State of Montana have each filed briefs as *amici curiae*.

The court below originally denied a motion by the defendant to dismiss the information. The Government and the defendant stipulated to an "Agreed Statement of Facts" and submitted the case for the court's determination. The trial court thereupon reconsidered its earlier ruling and entered an order dismissing the information. Finch asserts that submitting the stipulation of facts to the court put him once in jeopardy, and that we do not have jurisdiction over the Government's appeal because a reversal would place him in jeopardy a second time. We address this jurisdictional issue before reaching the merits.

I

[1] Our jurisdiction of the appeal by the Government is controlled by 18 U.S.C. § 3731, That statute authorizes appeals by the Government from all district court orders dismissing an indictment or information, except where the appeal would be barred by the double jeopardy clause of the Constitution. The Supreme Court recently gave careful consideration to this statute and concluded that its enactment expresses a congressional intent to "avoid creating nonconstitutional bars to the Government's right to appeal." *United States v. Wilson*, 420 U.S. 332, 339, 95 S.Ct. 1013, 1019, 43 L.Ed.2d 232 (1975). Our jurisdictional inquiry, therefore, must focus on whether the appeal is barred by the constitutional rule against double jeopardy. *United States v. Patrick*, 532 F.2d 142 (9th Cir. 1976).

[2] The threshold question is whether the defendant was once placed in jeopardy by the proceedings below. There are no mechanical rules for deciding whether jeopardy has attached. As the Supreme Court has declared, the phrase is used to mark that

"point in [the] criminal proceedings at which the constitutional purpose and policies" of the double jeopardy clause become implicated. *Serfass v. United States,* 420 U.S. 377, 388, 95 S.Ct. 1055, 1062, 43 L.Ed.2d 265 (1975), *citing United States v. Jorn,* 400 U.S. 470, 480, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971). In this case, we believe that jeopardy attached in the proceedings below.

[3] Appellee's initial motion to dismiss was denied. The parties then filed an "Agreed Statement of Facts."[2] The stipulation was a submission of the case to the district court for plenary determination and decision. This stipulation constituted a waiver of a jury trial; after it was filed, the district court undoubtedly had the power to determine the guilt or innocence of the defendant. The agreed statement of facts, moreover, was relevant to the district court's ultimate decision to dismiss the information. In the trial court's opinion announcing that it had reconsidered the earlier motion to dismiss, the court expressly stated: "After a thorough review of the file, I am compelled to reconsider my order . . .." 395 F.Supp. at 207.

In at least two essential respects, this case differs from *Serfass v. United States, supra,* in which the Supreme Court held that jeopardy had not attached. In *Serfass,* the petitioner had not waived his right to trial by jury (in fact, he had requested a jury trial), and the district court had no power to determine the petitioner's guilt or innocence. By contrast, the defendant here waived his right to a jury trial, and

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[2] The statement ended with the following paragraph:

> It is . . . agreed that this matter is hereby submitted to the court for its decision without further proof unless the court should desire proof on any point or points not covered herein to the satisfaction of the Court.

after the initial denial of his motion to dismiss, was subject to the risk of a determination of guilt.

[4] This case is also distinguishable from *United States v. Choate,* 527 F.2d 748 (9th Cir. 1975), *cert. denied,* 425 U.S. 971, 96 S.Ct. 2167, 48 L.Ed.2d 794 (1976). In that case, defendant waived a trial by jury, and the trial court received two stipulations of fact. Thereafter, the lower court granted the defendant's pretrial motion to dismiss on the ground that government agents had acted improperly. The Government appealed the dismissal, and the defendant argued that the waiver of the jury trial, coupled with receipt of the stipulations of fact, had placed him in jeopardy. We held that jeopardy had not attached. We reasoned that the factual stipulations received by the district court were not considered in its ruling on defendant's pretrial motion and that the parties clearly understood that the lodging of the stipulations had not put appellee in jeopardy. 527 F.2d at 751. In essence, the district court in *Choate* had no power to find the defendant guilty until it first ruled on the pretrial motion, and thus the defendant was not subject to the risk of a determination of guilt. *Choate* thus differs from this case in at least two respects: the parties in *Choate* had no expectation that the stipulations of fact would place the defendant in jeopardy and the trial court's ruling on the motion to dismiss in *Choate* was entirely unrelated to the factual stipulations. In light of the foregoing discussion, we conclude that in this case jeopardy attached at the time the case was submitted to the district court for decision.[3] *Cf. United*

[3] We emphasize that our ultimate conclusion on the jurisdictional question is unchanged even if we assume that, by dismissing the information, the trial court was declining to proceed under the stipulation. In that event, jeopardy would not have attached at all.

States v. Patrick, supra.

[5] This finding, however, does not necessarily preclude appellate jurisdiction, for "the conclusion that jeopardy has attached begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial." *Illinois v. Sommerville,* 410 U.S. 458, 467, 93 S.Ct. 1066, 1072, 35 L.Ed.2d 425 (1973), *quoted in Serfass v. United States,* 420 U.S. at 390, 95 S.Ct. 1055; *United States v. Patrick,* 532 F.2d at 146; *see, e.g., United States v. Wilson,* 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975); *United States v. Kehoe,* 516 F.2d 78 (5th Cir. 1975), *cert. denied,* 424 U.S. 909, 96 S.Ct. 1103, 47 L.Ed.2d 313 (1976). Accordingly, the next step is to determine the effect of the procedures that would take place on remand were the reviewing court to decide the merits of the appeal adversely to the defendant. Where these procedures are such that an individual who has once been placed in jeopardy will be put in jeopardy again, appellate jurisdiction is absent.

We are guided in our analysis by two recent decisions of the Supreme Court, *United States v. Wilson, supra,* and *United States v. Jenkins,* 420 U.S. 358, 95 S.Ct. 1006, 43 L.Ed.2d 250 (1975). In *Wilson* the trial court granted the defendant's motion to dismiss the indictment after the jury found him guilty. The Government appealed, and the defendant claimed that the Court lacked jurisdiction because reversal would result in double jeopardy. The Supreme Court held that further jeopardy would not result from a reversal, and thus established its jurisdiction to reach the substantive issues on appeal. The Court noted that the policies of the double jeopardy clause prevent the Government from getting a second chance to present its case to the trier of fact, perhaps using the experience gained during

the first proceeding to obtain a conviction. 420 U.S. at 352, 95 S.Ct. 1013. It followed that such policy considerations were not present where determination of the disputed legal issue would not result in a retrial, but would merely reinstate the jury verdict. *Id.* at 353, 95 S.Ct. 1013.

In *Jenkins* the Court considered a somewhat similar issue, presented, however, in the context of a trial to the court without a jury. At the close of the case, the district court filed findings of fact and conclusions of law, and ordered the indictment dismissed and the defendant discharged. The Supreme Court noted that in considering the double jeopardy problem, a bench trial differs from a jury trial in certain respects:

> In a case tried to a jury, the distinction between the jury's verdict of guilty and the court's ruling on questions of law is easily perceived. In a bench trial, both functions are combined in the judge, and a general finding of "not guilty" may rest either on the determination of facts in favor of a defendant or on the resolution of a legal question favorably to him. If the court prepares special findings of fact . . . it may be possible upon sifting those findings to determine that the court's finding of "not guilty" is attributable to an erroneous conception of the law whereas the court has resolved against the defendant all of the factual issues necessary to support a finding of guilt under the correct legal standard.

420 U.S. at 366-67, 95 S.Ct. at 1011. The Court pointed out, however, that this could not be done in the case before it:

> [It is not] clear to us that the District Court, in its findings of fact and conclusions of law,

> expressly or even impliedly found against respondent on all the issues necessary to establish guilt under even the Government's formulation of the applicable law. The court's opinion certainly contains no general finding of guilt, and although the specific findings resolved against respondent many of the component elements of the offense,. there is no finding on the statutory element of "knowledge."

420 U.S. at 367, 95 S.Ct. at 1012. Distinguishing *Wilson,* the Court in *Jenkins* found that it could not simply "reinstate the general finding of guilt: there was no such finding, in form or substance, to reinstate." *Id.* at 368, 95 S.Ct. at 1012. The Court thus held that the appeal had been properly dismissed.

[6] In light of the foregoing discussion, we find that the question in the instant case should be stated as follows: Once jeopardy has attached, and the proceedings are resolved in favor of the defendant, and the Government then appeals, will any proceedings after appeal require a determination of further factual issues before convicting or acquitting the defendant? If the answer is affirmative, because at the first trial sufficient facts were not established to satisfy all essential legal elements for a conviction, then the appeal is barred by the double jeopardy clause. While there may be some exceptions to this proposition, we discern none in the case before us.

In our case, unlike in *Jenkins,* it is relatively easy to separate the district judge's resolution of fact from his determination of law. Since the case was submitted on a written stipulation of facts, the district court was not required to hold further

proceedings before entry of judgement.[4]

Nevertheless, it elected to dismiss the information solely on a point of law. In this respect the case much more closely resembles *Wilson* than *Jenkins*, even though *Wilson* involved a jury trial and this case involved a bench trial. Here, as in *Wilson*, it is easy to separate factual resolutions from determinations of law. No additional facts must be found to determine whether the stipulation supports the conviction of the defendant. The only determination to be made is a legal one. Accordingly, we reach the merits of this appeal.

II

The statute under which appellee was charged prohibits entry without lawful authority or permission for the purpose of hunting, trapping, or fishing "upon any land that belongs to any Indian or Indian tribe, band, or group and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use . . ." 18 U.S.C. § 1165.

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[4] The existence of an express written stipulation distinguishes this case from *United States v. Patrick*, 532 F.2d 142 (9th Cir. 1976). In that case, we found that a reversal of a judgment of acquittal would place the defendant twice in jeopardy. We noted that although there were no disputed factual issues, the defendant below had not entered into an express stipulation of facts. 532 F.2d at 147. Without such a stipulation, the trial court had no power to find the defendant guilty; if the judgment of acquittal had been reversed, a remand to the district court would have required further proceedings devoted to resolution of essential factual issues. By contrast, appellee in this case did enter into an express stipulation of facts upon which the district court would be required to make a determination of guilt if all of the defendant's legal arguments were resolved against him. The *Patrick* opinion implies that had such a stipulation of fact existed in that case, a remand to the district court would *not* have put defendant in jeopardy a second time. The case therefore supports our conclusion that a remand in this case will not place appellee twice in jeopardy.

The prosecution contends that Finch made an unauthorized entry on the riverbed by casting his lure in the water. Therefore, to resolve the issue of guilt in the case, we must first determine whether the bed of the Big Horn River within the exterior boundaries of the Crow Reservation is Indian land within the statutory definition.

The present Crow Indian Reservation is part of a large tract recognized as Crow lands by the Treaty of Fort Laramie of 1851, 11 Stat. 749, 2 C. Kappler, Indian Affairs: Laws and Treaties 594 (hereinafter cited as Kapp.). The Treaty with the Crows of 1868, 15 Stat. 649, 2 Kapp. 1008, carved out from the 1851 territory a reservation of some 8,000,000 acres for the Crow Indians. Subsequent acts further reduced the size of the reservation.[5] The Big Horn River is a navigable watercourse[6] which flows through the heart of the Crow Indian Reservation from south to north.[7] Prior to 1851, the United States owned the bed of the Big Horn River. *Cf. United States v. Southern Pacific Transportation Co.*, 543 F.2d 676, 685 (9th Cir. 1976). The United States either transferred beneficial ownership of the bed to the Crow Tribe by the treaties of 1851 and 1868 or retained ownership of the bed as public lands, which passed to the State of Montana upon its admission to the Union.[8] Our disposition of this case depends on which alternative the Government followed when it

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[5] 22 Stat. 42 (1882); 26 Stat. 989 (1891); 33 Stat. 352 (1904); 50 Stat. 884 (1937).

[6] The parties have stipulated that the Big Horn River is now a navigable waterway.

[7] See the maps reproduced following the opinion of the district court. 395 F.Supp. at 215—20.

[8]. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 627-28, 90 S.Ct. 1328, 25 L.Ed.2d 615 (1969).

signed the treaties. Our examination is controlled by the opinions of the Supreme Court in two cases ruling on title to lands underlying navigable waters situated in Indian territory: *United States v. Holt State Bank,* 270 U.S. 49, 46 S.Ct. 197, 70 L.Ed. 465 (1926) and *Choctaw Nation v. Oklahoma,* 397 U.S. 620, 90 S.Ct. 1328, 25 L.Ed.2d 615 (1969). Correct application of these precedents is a delicate matter, as the two cases seem to fall on either side of the present controversy.

[7] It was early determined, before the *Holt* and *Choctaw* cases arose, that a disposition by the United States of public lands bordering on navigable waters, as a general rule, does not convey title or dominion to the lands situated below high water mark. *Shively v. Bowlby,* 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1893).[9] In *Shively* the United States had granted land adjacent to the Columbia River to a private party pursuant to the Oregon Donation Act, 9 Stat. 496. The Supreme Court held that absent the clearest expression of intent to the contrary, it would not presume that the United States intended to divest itself of part of the riverbed. The Court stated:

> The United States, while they hold the country as a Territory, having all the powers both of national and of municipal government, may grant, for appropriate purposes, titles or rights in the soil below high water mark of tide waters. But they have never done so by general laws; and, unless in some case of international duty or public exigency, have acted upon the policy, as most

[9] Our discussion assumes that the Big Horn River was navigable in 1851 and 1868. Our treaty interpretation would follow *a fartiori* if the river was not navigable when the treaties of 1851 and 1868 were signed.

> in accordance with the interest of the people and with the object for which the Territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters, and in the soil under them, to the control of the States, respectively, when organized and admitted into the Union.

152 U.S. at 58, 14 S.Ct. at 569. This principle of construction, applied in *Shively* to a grant to an individual owner, was subsequently invoked by the Supreme Court in a case concerning a transfer of land to Indian tribes, *United Staes v. Holt State Bank, supra.*

In *Holt State Bank* the dispute concerned ownership of the bed of Mud Lake, which lay wholly within the exterior boundaries of the Red Lake Reservation in the State of Minnesota. The Government, by treaties enacted before Minnesota was admitted to the Union, had recognized the right of the Chippewa Indians to occupy the reservation. The last relevant treaties preceding Minnesota statehood were concluded September 30, 1854, 10 Stat. 1109, 2 Kapp. 648, and February 22, 1855, 10 Stat. 1165, 2 Kapp. 685. At the time the treaties were signed, Mud Lake was a navigable body of water.

The Court found nothing in the language of the treaties or the background of the treaty negotiations to show an expressed intent by the United States to dispose of the lands underlying Mud Lake. Both the treaty of 1854 and the treaty of 1855 provided for the cession by the Chippewas to the United States of their claimed aboriginal right to occupy certain lands.[10] In return for that cession, the Government

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[10] Treaty with the Chippewa, 1854, Art. 1, 2 Kapp. 648; Treaty with the Chippewa, 1855, Art. 1, 2 Kapp. 685.

recognized that the Chippewas had rights in the land comprising the Red Lake Reservation. By the treaty of 1854, the United States did state that certain tracts of land were to be "set apart and with[held] from sale, for the use of the Chippewas," Art. 2, 2 Kapp. 648; and the treaty of 1855 provided that a sufficient quantity of land "be reserved and set apart . . . for the permanent homes of the said Indians" within designated locations. Art. 2, 2 Kapp. 685, 686. However, no express provisions guaranteeing to the Indians exclusive possession of the tracts were set out in either treaty, nor were any assurances given by the United States that the lands would never be put to any other use. The Supreme Court characterized the effect of the treaties as follows:

> There was no formal setting apart of what was not ceded, nor any affirmative declaration of the rights of the Indians therein . . .. The effect of what was done was to reserve in a general way for the continued occupation of the Indians what remained of their aboriginal territory. . ..

270 U.S. at 58, 46 S.Ct. at 200. Following the rule announced in the *Shively* case, the Court held that title and dominion of the lake bed remained vested in the national government and that ownership of the bed passed to the State of Minnesota on its admission to the Union.

In *Choctaw Nation V. Oklahoma, supra,* the second principal authority to be considered on this question, the Supreme Court, after examining treaty grants made under different circumstances, reached a different conclusion as to the ownership of lands underlying navigable waters. The Court was presented with the issue whether treaty grants from the United States to the Cherokee and Choctaw Indians con-

veyed title to parts of the Arkansas River. A series of treaties had provided for the relocation of the Choctaw and Cherokee tribes, but so great was the force of our westward expansion that part of the lands set aside for these Indians had already been settled before the Indians could be relocated. Attempts at further voluntary removal failed, and the national government, as well as the states of Georgia and Mississippi, started to exert pressure on the Indians. The Supreme Court described what followed:

> Thus faced with the prospect of losing both their lands and way of life, the Choctaws agreed in 1830 to leave Mississippi and to move to new lands west of the Arkansas territory. As a guarantee that they would not again be forced to move, the United States promised to convey the land to the Choctaw Nation in fee simple "to inure to them while they shall exist as a nation and live on it."

397 U.S. at 625, 90 S.Ct. at 1331. Similar promises were made to the Cherokees. *Id.* at 629, 90 S.Ct 1328. The Court concluded that this background, together with the rule of construction that well-founded doubts should be resolved in favor of the Indian tribes, were sufficient to overcome the presumption that the United States retained ownership of the riverbed. Accordingly, it found the *Holt State Bank* case inapplicable and held that the bed of the Arkansas River, at the disputed locations, was owned by the Indian tribes.

Turning to the case before us, we first examine the negotiations and background of the two relevant treaties with the Crows. These are the Treaty of Fort Laramie of 1851, *supra*, and the Treaty with the Crows of 1868, *supra*. The history and negotiation of the treaties were considered in detail by the Court of

Claims in *Crow Tribe of Indians v. United States,* 284 F.2d 361, 151 Ct.Cl. 281 (1960); *Crow Nation v. United States,* 81 Ct.Cl. 238 (1935); and *Fort Berthold Indians v. United States,* 71 Ct.Cl. 308 (1930). In brief, the negotiations for the Treaty of Fort Laramie of 1851 were precipitated by the increasing number of settlers who were crossing Indian lands on the westward journey to California, commencing in 1849 and 1850. The travelers freely used Indians lands for hunting buffalo and other game, and consumed timber and forage in increasing quantities. The Indians resented, and in some cases violently resisted, these incursions. Internecine warfare between different tribes over unsettled and ill-defined boundaries compounded the danger. The United States began negotiations with the Indians to stop these hostilities.

The Treaty of Fort Laramie of 1851 was concluded between the United States and eight Indian nations, including the Crows. On their face, the terms of the Treaty of Fort Laramie of 1851 do not consitute a clear and unambiguous grant of lands from the federal government to the Indian tribes. Article 5 of the treaty is cast as a covenant among the tribes alone to recognize specified boundaries for their respective territories, and from this clause, the United States would not appear to be a party to the recognition of Indian boundaries. 2 Kapp. 594.

Other provisions of the treaty lend support to a contrary reading. For example, in Article 3 the United States undertook to protect the Indians "against the commission of depredations by the people of the said United States," after the ratification of the treaty. *Id.* By Article 2, the Indians conceded to the United States the right "to establish roads, military and other posts, within

their respective territories." *Id.* The treaty also provides for monetary compensation for the concessions by the tribes, as well as for damage to the Indian nations both past and future. Art. 7, *id.* at 595.

By negative inference, these terms are susceptible to the interpretation that the Government of the United States recognized the Indian lands as belonging to the tribes. But they fall far short of constituting an express grant of all lands, including the beds of navigable streams, contained within the territorial boundaries.

Of more help to the appellant's position are the assurances that were given to the Indians by the Government during the negotiations preceding the 1851 treaty. The territories at issue were referred to as "your country" and "your land" and "your territory."[11] Similar references are contained in internal governmental communications."[12] It is principally in light of this background that the Court of Claims reached the conclusion that the United States, by the Treaty of Fort Laramie of 1851, recognized the title of the Crow Tribe to the lands described as theirs in Article 5 of the treaty. *Crow Tribe of Indians v. United States, supra,* at 371.

[8, 9] We need not, however, resolve this case solely

[11] *See Crow Tribe of Indians v. United States,* 284 F.2d 361, 366-67, 151 Ct.Cl. 281 (1960), *quoting* from an address by Treaty Commissioner Mitchell at the initial Council with the assembled representatives of the eight Indian Nations, held on September 8, 1851, reported in the St. Louis Republican, Oct. 26, 1851.

[12] *See* letter from Commissioner of Indian Affairs, W. Medill, to the Secretary of the Interior, June 15, 1849, *quoted in Crow Tribe of Indians v. United States,* 284 F.2d 361, 365, 151 Ct. Cl. 281 (1960); 1849 Report to Secretary of the Interior from Commissioner of Indian Affairs, *quoted in Crow Tribe of Indians, supra,* at 366; *Cf.* Letter from Comission of Indian Affairs to Treaty Commissioner Mitchell, May 26, 1851, S.Doc. No. 53, 70th Cong., 1st Sess. (1851), 4 Kapp. 1074—75, *quoted in Crow Tribe of Indians, supra,* at 366.

by reference to the Treaty of Fort Laramie of 1851. *Choctaw Nation, supra,* directs us to interpret the terms of an Indian treaty in light of its history and the negotiations preceding it and to construe doubtful language in favor of the Indians. The second relevant treaty, the Treaty with the Crows of 1868, when interpreted in light of its negotiations and the earlier treaty, convinces us that the national government, in 1868, did cede exclusive rights to the reservation lands. This cession, moreover, included rights in the riverbed.

Some fifteen years after the treaty of 1851, the Crow Tribe was approached anew by the Government. The purpose of the Government in the ensuing negotiations with the Crows was similar to that in its earlier negotiations with the Choctaw and Cherokee tribes: to reduce the size of the territory earlier designated as belonging to the tribe. During the negotiation of this second treaty, the Government, now acting through the Commissioner of Indian Affairs, again used language indicating that the Crows were to own the territory covered by the treaty.[13] Furthermore, the terms of the 1868 treaty

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[13] *Crow Tribe of Indians v. United States,* 284 F.2d 361, 367 n.3. The briefs filed by the United States and the *Crow Tribe in Crow Nation v. United States,* 81 Ct.Cl. 238 (1935), quote from the address of Commissioner Taylor to the representatives of the Crow Tribe at the beginning of the negotiations of the Treaty of 1868 at Fort Laramie on November 12, 1867, set out in the record of that case. 671 Printed Records of the Court of Claims 921-22, 1343. Commissioner Taylor said to the Crows, in part:

> My friends, chiefs, headmen, and warriors of the Crow Nation: * * * At our invitation you have come a long way, through much difficulty, to meet us. * * * Your Great Father at Washington, though so far away from you, is well informed of your friendship toward us. * * * He knows also, of some of the troubles and difficulties that surround you. He has sent us to see you in order that he may learn more fully, from your own lips, your true situation, and that he may take all necessary steps to remove those difficulties and to make your way smooth for the future.

themselves evidence an intent on the part of the United States to recognize that the Crow Indians were to have beneficial ownership of all lands within the exterior boundaries of the reservation. The national government explicitly agreed that such lands would be "set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them . . .." Art. 2, 15 Stat. 649, 2 Kapp. 1008. The treaty continues:

> [T]he United States now solemnly agrees that no person, except those herein designated and authorized so to do, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said Indians. . ..

> We learn that valuable mines have been discovered in your country, which, in some instances, are taken possession of by the white people. We learn that roads are laid out and traveled through your lands; that settlements have been made upon your lands; that your game is being driven away and is fast disappearing. We know, also, that the white people are rapidly increasing and are taking possession of and occupying all the valuable lands.
>
> Under these circumstances we are sent by the Great Father and the great council at Washington to arrange some plan to relieve you, as far as possible, from the bad consequences of this state of things and to protect you from future difficulties. We desire to set apart a tract of your country as a home for yourselves and children forever, upon which your Great Father will not permit the white man to trespass. We wish you to mark out a section of country that will suit you for this purpose. When that is set apart, we desire to buy of you the right to use and settle the rest, leaving to you, however, the right to hunt upon it all as long as the game lasts.

Id. at 921-22.

Id.[14]

Both the assurances given to the Indians during the negotiation of the treaty of 1868, considered against the backgrround of the treaty of 1851, and the explicit language of the 1868 treaty could have had no other meaning in the minds of the Indians than that the Government recognized that all the lands within the metes and bounds of the reservation were to be theirs. We thus conclude that the United States, by signing the treaty of 1868 with the Crows, intended to grant them dominion and control over that portion of the bed of the Big Horn River situated within the reservation,[15] subject to the retained power of the United States to exercise its paramount right to control navigation on the river.

It is true that the Treaty with the Crows of 1868 does not contemplate, by its express terms, that a patent will issue to convey the land to the Indian nation, nor does it contain an explicit promise that no part of the land granted shall be embraced in any territory or state, as did the treaties with the Choctaws and the Cherokees considered in *Chioctaw Nation.* But the absence of similar provisions in the treaty with the Crows is not determinative. We rule, in light of the foregoing, that in establishing the Crow Reservation, the United States intended that all lands therein, in-

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[14] By Article 11 of the treaty, the United States undertook that "[n]o treaty for the cession of any portion of the reservation [therein] described, which may be held in common [would] be of any force or validity as against the said Indians unless executed and signed by, at least, a majority of all the adult male Indians occupying or interest in the same . . .." 2 Kapp. at 1011. Such language also assumes that the United States recognized the extensive ownership rights of the Crow Tribe in the reservation lands.

[15] *Montana Power Co. v. Rochester,* 127 F.2d 189 (9th Cir. 1942), this court reaches a similar result in construing the Treaty of July 16, 1855, 12 Stat. 975, 2 Kapp. 722, negotiated with the Confederated Tribes of the Flathead, Kootenai, and Upper Pend d'Oreilles Indians.

cluding the riverbed, were to be for the exclusive use of the tribe.

Appellee has referred us to authorities in this circuit which, when deciding in doubtful cases whether the United States intended to convey lands underlying navigable waters to Indian tribes, inquire whether the livelihood of the Indians centered around fishing.[16] He argues that since there is no evidence that the Crow Indians used the river as a source of food the Government could not have intended to grant the riverbed to the Crow Tribe. Appellee misapprehends the purpose of Congress in creating the Crow Reservation. By establishing a reservation as a "permanent home" for the Crow Indians, *see* Treaty with the Crows of 1868, Art. 4, 2 Kapp. 1008, 1009, the Government manifestly intended to set aside lands which would provide the tribe with the food and natural resources upon which their livelihood depended. It is true that the Crow Indians, in 1868, were predominantly hunters.[17] The aim of the United States, however, was to fix the Crows in one location and to reorient their way of life toward

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[16] *E. g., Skokomish Indian Tribe v. France*, 320 F.2d 205 (9th Cir. 1963); *Moore v. United States*, 157 F.2d 760 (9th Cir. 1946). *See also Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 39 S.Ct. 40, 63 L.Ed. 138 (1918.

[17] Published histories of the Crow Tribe indicate that the Crow Indians engaged principally in the hunting of large game such as elk and buffalo. Fishing was neither a primary nor an important source of food or industry. In his definitive study of the Crow Tribe, R. Lowie states:

> A Crow was not happy without a diet of the flesh of ruminants. Boys went out shooting rabbits for fun, but that would be starvation fare for adults. I have never met a reference to eating of fish; berries, and roots dug up by the women formed a regular part of the ancient bill of fare but only as seasoning or dessert; and the corn traded in from the Hidatsa was eaten for the sake of variety rather than as a substitute for meat.

R. Lowie, The Crow Indians 72 (1938).

"agricultural and other pursuits."[18] We find it inconceivable that the United States intended to withhold from the Indians the right to sustain themselves from any source of food which might be available on their reservation. It must have been no mystery to the Government that the Crow Tribe, whose nomadic ways they sought to change, might eventually be forced to derive their existence from a source other than big game, should the large herds of buffalo and elk roaming the plains become extinct by accident of nature or decimation by man. *Cf. Menominee Tribe of Indians v. United States,* 388 F.2d 998, 179 Ct.Cl. 496, 1002 (1967) *aff'd,* 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed2d 697 (1968). We therefore decline to adopt an interpretation which would mean that the treaty of 1868 deprived the Crow Indians of potential control over a source of food on their reservation.[19]

Appellee argues that regardless of our determination as to ownership of the riverbed, he had a right to fish from the bank. Casting a fishing line and lure from a riverbank is an intrusion wholly sufficient to constitute an entry upon the riverbed. *See* W. Prosser, Handbook of the Law of Torts § 13 at 69 (4th ed. 1971). Appellee contends, however, that as

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[18] *See* letter from C. E. Mix, Acting Commissioner of Indian Affairs, to W. J. Cullen, Special Agent for Montana, April 30, 1868, informing Cullen of his appointment by the President as a Treaty Commissioner and instructing him of his duties, *quoted in part, Crow Nation v. United States,* 81 Ct.Cl. 238, 250 (1935).

[19] It should further be noted that the cases cited in note 15, *supra,* where an examination of the lifestyles of the Indian tribes was considered particularly important, involved controversies over the location of the exterior boundaries of lands set aside for the Indians. In the case before us, it is clear that the part of the Big Horn River at issue is within the metes and bounds of the Crow Reservation. *Cf. Choctaw Nation v. Oklahoma,* 397 U.S. 620, 628, 90 S. Ct. 1328, 25 L.Ed.2d 615 (1969).

the state's licensee he was exercising a privileged reparian right of access to the river, incident to Montana's ownership of the bank, and that he was not guilty of a "trespass on Indian lands" when he entered upon the riverbed to fish. We disagree.

[10,11] Before explaining the principles of riparian ownership that are controlling in this case, we note that our determination of these questions is announced as a matter of federal law. This results from the circumstances of the original grant of the reparian lands here in question. The State of Montana is, by purchase, the successor in interest of an original patentee whose grant was in fee simple from the United States. The riverbank in question originally constituted part of lands held by the United States in trust for the Crow Tribe, and it was deeded by the United States to the state's earliest predecessor in title, pursuant to the General Allotment Act of 1887, 24 Stat. 338, 25 U.S.C. §§ 331 *et seq.* When the national government holds trust ownership of a navigable stream bed and the lands littoral to it, and thereafter conveys the banks of the stream, the nature and extent of riparian rights conveyed by deeds to such lands must be determined as a matter of federal law. *The Confederated Salish and Kootenai Tribes v. Namen*, 534 F.2d 1376 (9th Cir. 1976), *aff'g* 380 F.Supp. 452 (D.Mont. 1974).

In the *Namen* case this Court concluded that Congress must have intended that grants of riparian lands under the Indian Allotment Acts should carry riparian rights of access and wharfage. 534 F.2d at 1377. It is therefore clear that the State of Montana and its licensees have a right of access to the waters of the Big Horn River at the location in question. It does not follow, however, that Montana's right of access to the waters of the river includes a protected

right to enter upon the riverbed for the purpose of fishing. *Cf. United States v. Pollmann*, 364 F.Supp. 995, 1000 (D.Mont. 1973). In order to prevail, appellee therefore must demonstrate the existence of an independent riparian right to fish inuring to the State of Montana by virtue of its riparian ownership, and that such right is paramount to the regulatory authority exercised by the national government and the Indian tribe.

[12] We find little guidance in the decided cases for resolving questions concerning the source or extent of a riparian right to fish in navigable waters as a matter of federal common law. The authorities that have come to our attention involve the interpretation of state or territorial law, and they are generally inconclusive on the subject. A majority of the cases contain oblique references to a riparian right to fish in navigable waters but give no indication of the limitations on its exercise.[20] Those few cases which discuss the dimensions of the riparian right to fish express two different views. The first group states that the right of a riparian owner to fish in navigable waters is no greater than the common right of

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[20] *See, e.g., United States v. Sexton Cove Estates*, 526 F.2d 1293, 1300 n.18 (5th Cir. 1976); *Springer v. Joseph Schlitz Brewing Co.*, 510 F.2d 468, 470 (4th Cir. 1975); *Burns v. Forbes*, 412 F.2d 995, 998 (3rd Cir. 1969); *United States v. 220.0 Acres of Land, State of Md.*, 306 F.Supp. 138, 151 (D.Md. 1969). *See also* G. Thompson, Real Property § 274 (2d ed. 1964).

The only facet of the right which seems well established is that a riparian owner has no exclusive right to fish in navigable waters in the absence of an express grant and, as a corollary, may not prevent the public from fishing in the navigable waters contiguous to his land. *See, e.g.*, 2 American Law of Property § 9.49 (A. J. Casner ed. 1952); H. Farnham, Water and Water Rights 375 (1904); Waters and Water Rights § 36.4(A) at 198 (R. Clark ed. 1967); S. Wiel, Water Rights in the Western States § 907 (3d ed. 1911); Annot., 47 A.L.R.2d 381; 35 Am.Jur.2d *Fish and Game* § 11; 36A C.J.S. Fish §§ 6,8.

fishing enjoyed by the general public,[21] and from this it would follow that the riparian right to take fish is simply a right of access, from which one cannot derive an additional interest in land, a *profit a prendre* for fishery. The second view appears to recognize a riparian right to fish which is superior to the common right of fishery.[22]

[13] Despite these differences, however, the cases which address the point indicate that the riparian right to fish, whether it is a *profit a prendre* or simply the means of access to a right that is enjoyed by all, is in either event subject to close regulation by the governing authorities;[23] and we need go no further than to recognize this principle to resolve the instant case. We hold that the Government has exercised regulatory power which is superior, on the facts of this case, to any riparian right to fish held by the State of Montana or its licensees.

Appellee would deny that the United States, either alone or in conjunction with the Crow Tribe, is exercising a regulatory power in this case, and contends that the Crow Tribe Ordinance which closed Indian lands to fishing was promulgated without authority. We reject that argument.

[14-16] Even assuming that the authority of the Crow Tribe to control access to its own reservation is

[21] *International Shoe co. v. Heatwole*, 126 W.Va. 888, 30 S.E.2d 537, 540, (1944); *Small v. Wallace*, 124 Me. 365, 129 A. 444, 445 (1925).

[22] *Ross v. Mayor and Council of Borough of Edgewater*, 115 N.J.Law 477, 180 A. 866, 870 *aff'd*, 116 N.J.Law 447, 184 A. 810, *cert. denied*, 299 U.S. 543, 57 S.Ct. 37, 81 L.Ed. 400 (1935).

[23] *C. J. Hendry Co. v. Moore*, 318 U.S. 133, 135, 63 S.Ct. 499, 87 L.Ed. 663 (1943) and cases cited therein; *United States v. Pollmann*, 364 F.Supp. 995, 1000 (D.Mont. 1973); *Corsa v. Tawes*, 149 F.Supp. 771, 773 (D.Md.), *aff'd per curiam*, 355 U.S. 37, 78 S.Ct. 116, 2 L.Ed.2d 70 (1957). *See* H. Farnham, Water and Water Rights 375, 382 (1904); S. Wiel, Water Rights in the Western States § 907 (3rd ed. 1911); 36A C.J.S. *Fish* §§ 8, 26.

insufficient to sustain the closure of its lands to fishing by non-Indians, *but cf. Quechan Tribe of Indians v. Rowe*, 531 F.2d 408 (9th Cir. 1976), the authority to withhold permission to enter for fishing, hunting, or trapping has been expressly conferred on the tribe by the promulgation of 18 U.S.C. § 1165, an enactment clearly within the national power. The language and the history of 18 U.S.C. § 1165 show that the right of Indians to control hunting, trapping and fishing on their lands is a prerogative of ownership which the United States recognizes as a matter of federal law. It was the intent of Congress that "Indian property owners should have the same protection as any other property owners" such as, for example, "a private hunting club [which] may keep nonmembers off its game lands or . . . may issue a license for a fee."[24] Under the Act, a tribe may

[24] H.Rep. N. 625, 86th Cong., 2d Sess. 2; S.Rep. No. 1686, 86th Cong., 2d Sess. 2. Prior to the enactment of section 1165, Indian property owners could not protect their lands against trespassing by non-Indians for the purpose of hunting, trapping, and fishing. Both the House and the Senate reports stated that "[n]on-Indians are not subject to the jurisdiction of Indian courts and cannot be tried in Indian courts on trespass charges." H.Rep. No. 625, *supra*, at 2; S.Rep. No. 1686, *supra*, at 2. (The correctness of that assumption may now be questioned in light of our recent decision in *Oliphant v. Schlie*, 544 F.2d 1007 (9th Cir. 1976).) Furthermore, there were no federal laws which could be invoked against trespassers. The House report notes:

> There is a Federal statute making it an offense for a non-Indian to hunt or trap on lands of treaty tribes except for subsistence (25 U.S.C. 216). However, as pointed out in the report of the Secretary of the Interior, this act does not cover fishing, is limited to lands of tribes with treaties, and in effect sanctions trespass if it is "for subsistence in Indian country." To this might be added the practical fact that some U.S. attorneys hesitate to prosecute under this act which dates back to 1834, because of the difficulty of proof on the subsistence point and mainly because there is a feeling that the 1834 act was designed for the old-time professional hunter and trapper, not the weekenders or local rod-and-gun members who pose the modern problem.

H.Rep. No. 625, *supra*, at 2. The legislation was thus intended to provide sanctions for hunting, trapping, and fishing on Indian lands

refuse entry for fishing on its lands just as an individual Indian owner might do, and the sanctions apply in either case. The Crow Tribal Ordinance dated October 13, 1973, by which nonmembers of the tribe were prohibited from fishing within the confines of the reservation, was ample notification by the beneficial owners of the bed of the river within the reservation that consent to entry for such purposes was withheld.[25]

[17] Appellee finally contends that the ordinance which bans all nontribal members from fishing on the Crow Reservation denies him equal protection of the laws guaranteed to nontribal members by 25 U.S.C. § 1302(8), and is therefore void. The Supreme Court rejected similar arguments in *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). *See also Moe v. The Confederated Salish and*

"without the consent in the form of a license or permit for which a fee can be charged, by the Indian or tribe concerned." H.Rep. No. 625, *supra*, at 1. *See also* Letter from Assistant Secretary of the Interior Ernst, to Rep. Celler, Chairman of the Committee on the Judiciary, February 13, 1958, which states in pertinent part:

> In a great many instances, fish and game are much more plentiful on Indian reservations than on adjacent lands, and non-Indian hunters and fishermen come onto the reservations to hunt and fish. Indian tribes have the right to control or to prohibit hunting and fishing on their reservations, and to charge fees for permitting hunting and fishing. Sometimes the money derived from hunting and fishing permits represents a sizable portion of the tribal income.

H.Rep. No. 625, *supra*, at 4.

[25] That the waters of the Big Horn River are navigable is irrelevant to the question whether or not there was a prohibited entry for the purposes of fishing. We have expressly observed that there is no inherent conflict between the Government holding lands in trust exclusively for Indian fisheries and its also holding the waters over such lands in trust for the purposes of navigation. *Moore v. United States*, 157 F.2d 760 (9th Cir. 1946). It is well settled that the United States may exercise its power to protect Indian fisheries even as to waters that are subject to the public easement of navigation. *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 39 S.Ct. 40, 63 L.Ed. 138 (1918).

Kootenai Tribes of the Flathead Reservation, 425 U.S. 463, 480, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976). Its explanation for sustaining the statute specially applicable to the Indians in that case is equally applicable to the tribal ordinance at issue here.

We conclude that the bed of the Big Horn River within the confines of the Crow Indian Reservation is held by the United States in trust for the Indian tribe and that appellee violated 18 U.S.C. § 1165 by willfully and knowingly fishing without lawful authority or permission of the tribe.

The order of the district court dismissing the information is accordingly reversed, and the cause is remanded for entry of judgment based on the stipulation filed in the district court by both parties to this cause.

REVERSED AND REMANDED.

APPENDIX D

Articles of the treaty made and concluded at Fort Laramie, in the Indian Territory, between D. D. Mitchell, superintendent of Indian affairs, and Thomas Fitzpatrick, Indian agent, commissioners specially appointed and authorized by the President of the United States, of the first part, and the chiefs, headmen, and braves of the following Indian nations, residing south of the Missouri River, east of the Rocky Mountains, and north of the lines of Texas and New Mexico, viz, the Sioux or Dahcotahs, Cheyennes, Arrapahoes, Crows, Assinaboines, Gros-Ventre Mandans, and Arrickarus, parties of the second part on the seventeenth day of September, A. D. one thousand eight hundred and fifty-one.[a]

ARTICLE 1. The aforesaid nations, parties to this treaty, having assembled for the purpose of establishing and confirming peaceful relations amongst themselves, do hereby covenant and agree to abstain in future from all hostilities whatever against each other, to maintain good faith and friendship in all their mutual intercourse, and to make an effective and lasting peace.

ARTICLE 2. The aforesaid nations do hereby recognize the right of the United States Government to establish roads, military and other posts, within their respective territories.

ARTICLE 3. In consideration of the rights and privileges acknowledged in the preceding article, the United States bind themselves to protect the aforesaid Indian nations against the commission of

[a] This treaty as signed was ratified by the Senate with an amendment changing the annunity in Article 7 from fifty to ten years, subject to acceptance by the tribes. Assent of all tribes except the Crows was procured (see Upper Platte C., 570, 1853, Indian Office) and in subsequent agreements this treaty has been recognized as in force (see post p. 776).

all depredations by the people of the said United States, after the ratification of this treaty.

ARTICLE 4. The aforesaid Indian nations do hereby agree and bind themselves to make restitution or satisfaction for any wrongs committed, after the ratification of this treaty, by and band or individual of their people, on the people of the United States, whilst lawfully residing in or passing through their respective territories.

ARTICLE 5. The aforesaid Indian nations do hereby recognize and acknowledge the following tracts of country, included within the metes and boundaries hereinafter designated, as their respective territories, *'viz:*

The territory of the Sioux or Dahcotah Nation, commencing the mouth of the White Earth River, on the Missouri River; thence in a southwesterly direction to the forks of the Platte River; thence up the north fork of the Platte River to a point known as the Red Bute, or where the roads leaves the river; thence along the range of mountains known as the Black Hills, to the head-waters of Heart River; thence down Heart River to its mouth; and thence down the Missouri River to the place of beginning.

The territory of the Gros Ventre, Mandans, and Arrickasas Nations, commencing at the mouth of Heart River; thence up the Missouri River to the mouth of the Yellowstone River; thence up the Yellowstone River to the mouth of Powder River in a southeasterly direction, to the head-waters of the Little Missouri River; thence along the Black Hills to the head of Heart River, and thence down Heart River to the place of beginning.

The territory of the Assinaboin Nation, commencing at the mouth of Yellowstone River; thence up the Missouri River to the mouth of the Muscle-shell

River; thence from the mouth of the Muscle-shell River in a southeasterly direction until it strikes the head-waters of Big Dry Creek; thence down that creek to where it empties into the Yellowstone River, nearly opposite the mouth of Powder River, and thence down the Yellowstone River to the place of beginning.

The territory of the Blackfoot Nation, commencing at the mouth of Muscle-shell River; thence up the Missouri River to its source; thence along the main range of the Rocky Mountains, in a southerly direction, to the head-waters of the northern source of the Yellowstone River; thence down the Yellowstone River to the mouth of Twenty-five Yard Creek; thence across to the head-waters of the Muscle-shell River, and thence down the Muscle-shell River to the place of beginning.

The territory of the Crow Nation, commencing at the mouth of Powder River on the Yellowstone; thence up Powder River to its source; thence along the main range of the Black Hills and Wind River Mountains to the head-waters of the Yellowstone River; thence down the Yellowstone River to the mouth of Twenty-five Yard Creek; thence to the head-waters of the Muscle-shell River; thence down the Muscle-shell River to its mouth; thence to the head-waters of Big Dry Creek, and thence to its mouth.

The territory of the Cheyennes and Arrapahoes, commencing at the Red Bute or the place where the road leaves the north fork of the Platte River, thence up the north fork of the Platte River to its source; thence along the main range of the Rocky Mountains to the head-waters of the Arkansas River; thence down the Arkansas River to the crossing of the Santa Fe' road; thence in a northwesterly direction to

the forks of the Platte River, and thence up the Platte River to the place of beginning.

It is, however, understood that, in making this recognition and acknowledgement, the aforesaid Indian nations do not hereby abandon or prejudice any rights or claims they may have to other lands; and further, that they do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described.

ARTICLE 6. The parties to the second part of this treaty having selected principals or head-chiefs for their respective nations through whom all national business will hereafter be conducted, do hereby bind themselves to sustain said chiefs and their successors during good behavior.

ARTICLE 7. In consideration of the treaty stipulations and for the damages which have or may occur by reason thereof to the Indian nations, parties hereto, and for their maintenance and the improvement of their moral and social customs, the United States bind themselves to deliver to the said Indian nations the sum of fifty thousand dollars per annum for the term of ten years, with the right to continue the same at the discretion of the President of the United States for a period not exceeding five years thereafter, in provisions, merchandise, domestic animals, and agricultural implements, in such proportions as may be deemed best adapted to their condition by the President of the United States, to be distributed in proportion to the population of the aforesaid Indian nations.

ARTICLE 8. It is understood and agreed that should any of the Indian nations, parties to this treaty, violate any of the provisions thereof, the United States may withhold the whole or a portion

of the annuities mentioned in the preceding article from the nation so offending, until in the opinion of the President of the United States, proper satisfaction shall have been made.

In testimony whereof the said D. D. Mitchell and Thomas Fitzpatrick commissioners as aforesaid, and the chiefs, headmen, and braves, parties hereto, have set their hands and affixed their marks, on the day and at the place first above written.

D.D. Mitchell
Thomas Fitzpatrick
Commissioners.

Sioux:
Mah-toe-wha-you-whey, his x mark.
Mah-kah-toe-zah-zah, his x mark.
Bel-o-ton-kah-tan-ga, his x mark.
Nah-ka-pah-gi-gi, his x mark.
Mak-toe-sah-bi-chis, his x mark.
Meh-wha-tah-ni-hans-kah, his x mark

Cheyennes:
Wah-ha-nis-satta, his x mark.
Voist-ti-toe-vetz, his x mark.
Nahk-ko-me-ien, his x mark.
Koh-kay-y-wh-cum-est, his x mark.

Arrapahoes:
Be-ah-te-a-qui-sah, his x mark.
Neb-ni-bah-seh-it, his x mark.
Beh-kah-jay!beth-sah-es, his x mark.

Crows:
Arra-tu-ri-sash, his x mark.
Doh-chepit-seh-chi-es, his x mark.

Assinaboines:
Mah-toe-wit-ko, his x mark.
Toe-tah-ki-eh-nan, His x mark.

Mandans and Gros Ventres:
Nochk-pit-shi-toe-pish, his x mark.
She-oh-mant-ho, his x mark.

Arickarecs:
Koun-hei-ti-shan, his x mark.
Bi-atch-tah-wetch, his x mark.

In the presence of—
A. B. Chambers, secretary.
S. Cooper, colonel, U.S. Army.
R. H. Chilton, captain, First Drags.
Thomas Duncan, captain, Mounted Riflemen.
Thos.G.Rhett, brevet capt.R.M.R.
W. L. Elliott, first lieutenant R. M. R.
C. Campbell, interpreter for Sioux.
John S. Smith, interpreter for Cheyennes.
Robert Meldrum, interpreter for the Crows.
H. Culbertson, interpreter for Assiniboines and Gros Ventres.
Francois L'Etalie, interpreter for Arickarees.
John Pizelle, interpreter for the Arrapahoes.
B. Gratz Brown.
Robert Campbell.
Edmund F. Chouteau.

APPENDIX E

TREATY WITH THE CROWS, 1868.

Articles of a treaty made and concluded at Fort Laramie, Dakota Territory, on the seventh day of May, in the year of our Lord one thousand eight hundred and sixty-eight, by and between the undersigned commissioners on the part of the United States, and the undersigned chiefs and head-men of and representing the Crow Indians, they being duly authorized to act in the premises.

ARTICLE 1. From this day forward peace between the parties to this treaty shall forever continue. The Government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they hereby pledge their honor to maintain it. If bad men among the whites or among other people, subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also re-imburse the injured person for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Indians herein named solemnly agree that they will, on proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished according to its laws; and in case they refuse willfully so to do the person injured shall be reimbursed for his loss from

the annuities or other moneys due or to become due to them under this or other treaties made with the United States. And the President, on advising with the Commissioner of Indian Affairs, shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper. But no such damages shall be adjusted and paid until thoroughly examined, and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss while violating, or because of his violating, the provisions of this treaty or the laws of the United States shall be re-imbursed therefore.

ARTICLE 2. The United States agrees that the following district of country, to wit: commencing where the 107th degree of longitude west of Greenwich crosses the south boundary of Montana Territory; thence north along said 107th meridian to the mid-channel of the Yellowstone River; thence up said mid-channel of the Yellowstone to the point where it crosses the said southern boundary of Montana, being the 45th degree of north latitude; and thence east along said parallel of latitude to the place of beginning, shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons, except those herein designated and authorized so to do, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article for the use of said

Indians, and henceforth they will, and do hereby. relinquish all title, claims, or rights in and to any portion of the territory of the United States, except such as is embraced within the limits aforesaid.

ARTICLE 3. The United States agrees, at its own proper expense, to construct on the south side of the Yellowstone, near Otter Creek, a warehouse or store-room for the use of the agent in storing goods belonging to the Indians, to cost not exceding twenty-five hundred dollars; an agency-building for the residence of the agent, to cost not exceeding three thousand dollars; a residence for the physician, to cost not more than three thousand dollars; and five other buildings, for a carpenter, farmer, blacksmith, miller, and engineer, each to cost not exceeding two thousand dollars; also a school-house or mission-building, so soon as a sufficient number of children can be induced by the agent to attend school, which shall not cost exceeding twenty-five hundred dollars.

The United States agrees further to cause to be erected on said reservation, near the other buildings herein authorized, a good steam circular saw-mill, with a grist-mill and shingle-machine attached, the same to cost not exceeding eight thousand dollars.

ARTICLE 4. The Indians herein named agree, when the agency-house and other buildings shall be constructed on the reservation named, they will make said reservation their permanent home, and they will make no permanent settlement elsewhere, but they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts.

ARTICLE 5. The United States agrees that the

agent for said Indians shall in the future make his home at the agency-building; that he shall reside among them, and keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint, by and against the Indians, as may be presented for investigation under the provisions of their treaty stipulations, as also for the faithful discharge of other duties enjoined on him by law. In all cases of depredation on person or property, he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty.

ARTICLE 6. If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding three hundred and twenty acres in extent, which tract, when so selected, certified, and recorded in the "land book," as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for purposes of cultivation, a quantity of land not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed.

For each tract of land so selected a certificate, containing a description thereof and the name of the person selecting it, with a certificate endorsed thereon that the same has been recorded, shall be

delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office, subject to inspection, which said book shall be known as the "Crow land book."

The President may at any time order a survey of the reservation, and, when so surveyed, Congress shall provide for protecting the rights of settlers in their improvements, and may fix the character of the title held by each. The United States may pass such laws on the subject of alienation and descent of property as between Indians, and on all subjects connected with the government of the Indians on said reservations and the internal police thereof, as may be thought proper.

ARTICLE 7. In order to insure the civilization of the tribe entering into this treaty, the necessity of education is admitted, especially by such of them as are, or may be, settled on said agricultural reservation; and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that for every thirty children, between said ages, who can be induced or compelled to attend school, a house shall be provided, and a teacher, competent to teach the elementary branches of an English education, shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher. The provisions of this article to continue for twenty years.

ARTICLE 8. When the head of a family or lodge shall have selected lands and received his certificate as above directed, and the agent shall be satisfied

that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seed and agricultural implements for the first year in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of three years more, he shall be entitled to receive seed and implements as aforesaid in value twenty-five dollars per annum.

And it is further stipulated that such persons as commence farming shall receive instructions from the farmer herein provided for, and whenever more than one hundred persons shall enter upon the cultivation of the soil, a second blacksmith shall be provided, with such iron, steel, and other material as may be required.

ARTICLE 9. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named, under any and all treaties heretofore made with them, the United States agrees to deliver at the agency house, on the reservation herein provided for, on the first day of September of each year for thirty years, the following article, to wit:

For each male person, over fourteen years of age, a suit of good substantial woolen clothing, consisting of coat, hat, pantaloons, flannel shirt, and a pair of woolen socks.

For each female, over twelve years of age, a flannel skirt, or the goods necessary to make it, a pair of woolen hose, twelve yards of calico, and twelve yards of cotton domestics.

For the boys and girls under the ages named, such flannel and cotton goods as may be needed to make each a suit as aforesaid, together with a pair of woollen hose for each.

And in order that the Commissioner of Indian Af-

fairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent, each year, to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based.

And, in addition to the clothing herein named, the sum of ten dollars shall be annually appropriated for each Indian roaming, and twenty dollars for each Indian engaged in agriculture, for a period of ten years, to be used by the Secretary of the Interior in the purchase of such articles as, from time to time, the condition and necessities of the Indians may indie ate to be proper. And if, at any time within the ten years, it shall appear that the amount of money needed for clothing, under this article, can be appropriated to better uses for the tribe herein named, Congress may, by law, change the appropriation to other purposes; but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named. And the President shall annually detail an officer of the Army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery; and it is expressly stipulated that each Indian over the age of four years, who shall have removed to and settled permanently upon said reservation, and complied with the stipulations of this treaty, shall be entitled to receive from the United States, for the period of four years after he shall have settled upon said reservation, one pound of meat and one pound of flour per day, provided the Indians cannot furnish their own subsistence at an earlier date. And it is further stipulated that the United States will furnish and deliver to each lodge of Indians, or family of persons legally incorporated

with them who shall remove to the reservation herein described, and commence farming, one good American cow and one good, wellbroken pair of American oxen, within sixty days after such lodge or family shall have so settled upon said reservation.

ARTICLE 10. The United States hereby agrees to furnish annually to the Indians the physician, teachers, carpenter, miller, engineer, farmer, and blacksmiths as herein contemplated, and that such appropriations shall be made from time to time, on the estimates of the Secretary of the Interior, as will be sufficient to employ such persons.

ARTICLE 11. No treaty for the cession of any portion of the reservation herein described, which may be held in common, shall be of any force, or validity as against the said Indians unless executed and signed by, at least, a majority of all the adult male Indians occupying or interested in the same, and nocession by the tribe shall be understood or construed in such a manner as to deprive, without his consent, any individual member of the tribe of his right to any tract of land selected by him as provided in Article 6 of this treaty.

ARTICLE 12. It is agreed that the sum of five hundred dollars annually, for three years from the date when they commence to cultivate a farm, shall be expended in presents to the ten persons of said tribe who, in the judgment of the agent may grow the most valuable crops for the respective year.

W. T. Sherman,
Lieutenant-General.
Wm. S. Harney,
Brevet Major-General and Peace Commissioner.
Alfred H. Terry,
Brevet Major-General.

C. C. Augur,
Brevet Major-General.
John B. Sanborn.
S. F. Tappan.
Ashton S. H. White, Secretary.

Che-ra-pee-ssh-ka-te, Pretty Bull, his x mark. [seal]
Chat-sta-he, Wolf Bow, his x mark. [seal]
Ah-be-che-se, Mountain Tail, his x mark. [seal]
Kam-ne-but-sa, Black Foot, his x mark. [seal]
De-sal-ze-cho-se, White Horse, his x mark.____[seal]
Chin-ka-she-arache, Poor Elk, his x mark.____[seal]
E-sa-woor, Shot in the Jaw, his x mark._____[seal]
E-sha-chose, White Forehead his x mark.____[seal]
——Roo-ka, Pounded Meat, his x mark. [seal]
De-ka-ke-up-se, Bird in the Neck, his x mark [seal]
Me-na-che, The Swan, his x mark. [seal]

Attest:

George B. Willis, phonographer.
John D. Howland.
Alex. Gardner.
David Knox.
Chas. Freeman.
Jas. C. O'Connor.

APPENDIX F

General Allotment Act of Feb. 8, 1887, 24 Stat. 388.

CHAP. 119.—An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows:

To each head of a family, one-quarter of a section;

To each orphan child under eighteen years of age, one-eighth of a section; and

To each other single person under eighteen years now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section: *Provided,* That in case there is not sufficient land in any of said reservations to allot lands to each individual of the classes above named in quantities as above provided, the lands embraced in

such reservation or reservations shall be allotted to each individual of each of said classes pro rata in accordance with the provisions of this act: *And provided further,* That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty in quantities in excess of those herein provided, the President, in making allotments upon such reservation, shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty or act: *And provided further,* That when the lands allotted are only valuable for grazing purposes, an additional allotment of such grazing lands, in quantities as above provided, shall be made to each individual.

SEC. 2. that all allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection. Where the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under this act: *Provided,* That if any one entitled to an allotment shall fail to make a selection within four years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which election shall be allotted as in cases where selections are made by the

Indians, and patents shall issue in like manner.

SEC. 3. That the allotments provided for in this act shall be made by special agents appointed by the President for such purpose, and the agents in charge of the respective reservations on which the allotments are directed to be made, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office.

SEC. 4. That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands, the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions as herein provided. And the fees to which the officers of such local land office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them, from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Com-

missioner of the General Land Office, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior.

SEC. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided,* That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided,* That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act: *And, provided further,* That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the

opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress: *Provided however,* That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: *And provided further,* That its patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent, shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at

three per cent per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the General Land Office, and afterward delivered, free of charge, to the allottee entitled thereto. And if any religious society or other organization is now occupying any of the public lands to which this act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is hereby authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be so occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law. And hereafter in the employment of Indian police, or any other employes in the public service among any of the Indian tribes or bands affected by this act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this act and become citizens of the United States shall be preferred.

SEC. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall

have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

SEC. 7. That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

SEC. 8. That the provision of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in the Indian Territory, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by executive order.

SEC. 9. That for the purpose of making the surveys and resurveys mentioned in section two of this

act, there be, and hereby is, appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of one hundred thousand dollars, to be repaid proportionately out of the proceeds of the sales of such land as may be acquired from the Indians under the provisions of this act.

SEC. 10. That nothing in this act contained shall be so construed as to affect the right and power of Congress to grant the right of way through any lands granted to an Indian, or a tribe of Indians, for railroads or other highways, or telegraph lines, for the public use, or to condemn such lands to public uses, upon making just compensation.

SEC. 11. That nothing in this act shall be so construed as to prevent the removal of the Southern Ute Indians from their present reservation in Southwestern Colorado to a new reservation by and with the consent of a majority of the adult male members of said tribe.

Approved, February 8, 1887.

APPENDIX G

ACT OF JUNE 4, 1920

CHAP. 224. — An Act to provide for the allotment of lands of the Crow Tribe, for the distribution of tribal funds, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he hereby is, authorized and directed to cause to be allotted the surveyed lands and such unsurveyed lands as the commission hereinafter provided for may find to be suitable for allotment, within the Crow Indian Reservation in Montana (not including the Big Horn and Pryor Mountains, the boundaries whereof to be determined by said commission with the approval of the Secretary of the Interior) and not herein reserved as hereinafter provided, among the members of the Crow Tribe, as follows namely, one hundred and sixty acres to the heirs of every enrolled member, entitled to allotment, who died unalloted after December 31, 1905, and before the passage of this Act; next, one hundred and sixty acres to every allotted member living at the date of the passage of this Act, who may then be the head of a family and has not received allotment as such head of a family; and thereafter to prorate the remaining unallotted allotable lands and allot them so that every enrolled member living on the date of the passage of this Act and entitled to allotment shall receive in the aggregate an equal share of the allotable tribal lands for his total allotment of land of the Crow Tribe. Allotments made hereunder shall vest title in the allottee subject only to existing tribal leases, which leases in no event shall be

renewed or extended by the Secretary of the Interior after the passage of this Act, and shall as hereinafter provided be evidenced by patents in fee to competent Indians, except as to homesteads as hereinafter provided, but by trust patent to minors and incompetent Indians, the force and legal effect of the trust patents to be as is prescribed by the General Allotment Act of February 8, 1887 (Twenty-fourth Statutes, page 388). Priority of selection, up to three hundred and twenty acres, is hereby given to the members of the tribe who have as yet received no allotment on the Crow Reservation, and thereafter all members enrolled for allotment hereunder shall in all respects be entitled to equal rights and privileges, as far as possible, in regard to the time, manner, and amount of their respective selections: *Provided*, That Crow Indians who are found to be competent may elect, in writing, to have their allotments, except as herein provided, patented to them in fee. Otherwise trust patents shall be issued to them. No patent in fee shall be issued for homestead lands of a husband unless the wife joins in the application, who shall be examined separately and apart from her husband and a certificate of the officer taking her acknowledgment shall fully set forth compliance with this requirement.

SEC. 2. No conveyance of land by any Crow Indian shall be authorized or approved by the Secretary of the Interior to any person, company, or corporation who owns at least six hundred and forty acres of agricultural or one thousand two hundred and eighty acres of grazing land within the present boundaries of the Crow Indian Reservation, nor to any person who, with the land to be acquired by such conveyance, would become the owner of more than one thousand two hundred and eighty acres of

agricultural or one thousand nine hundred and twenty acres of grazing land within said reservation. Any conveyance by any such Indian made either directly or indirectly to any such person, company, or corporation of any land within said reservation as the same now exists, whether held by trust patent or by patent in fee shall be void and grantee accepting the same shall be guilty of a misdemeanor and be punished by a fine of not more than $5,000 or imprisonment not more than six months or by both such fine and imprisonment.

The classification of the lands of such reservation for the purpose of allotment and the allotment thereof shall be made as provided in the Act of Congress approved June 25, 1910 (Thirty-sixth Statutes at Large, page 859), which classification with any heretofore made by authority of law as to lands heretofore allotted shall be conclusive, for the purposes of this section, as to the character of the land involved.

SEC. 3. That the Secretary of the Interior shall, as speedily as possible, after the passage of this Act, prepare a complete roll of the members of the Crow Tribe who died unallotted after December 31, 1905, and before the passage of this Act; also a complete roll of the allotted members of the Crow Tribe who six months after the date hereof are living and are heads of families but have not received full allotments as such; also, a complete roll of the unallotted members of the tribe living six months after the approval of this Act who are entitled to allotments. Such rolls when completed shall be deemed the final allotment rolls of the Crow Tribe, on which allotment of all tribal lands and distribution of all tribal funds existing at said date shall be made. The rolls shall show the English, as well as the Indian, name

of the allottee; the age, if living; the sex, whether declared competent or incompetent; the description or descriptions of the allotments; and any other fact deemed by the Secretary of the Interior necessary or proper. Said rolls shall be completed within one year after the approval of this Act, and allotments shall be completed within one year and six months from the date of the approval of this Act.

SEC. 4. That any names found to be on the tribal rolls fraudulently, may, at any time within one year from the passage of this Act, be stricken therefrom by the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, after giving all parties in interest a full opportunity to be heard in regard thereto; and any allotment made to such fraudulent allottee shall be canceled and shall then be subject to disposition under the provision of this Act: *Provided,* That nothing herein contained shall be construed to deprive any such persons of the protection in the premises provided under existing law.

SEC. 5. That such of the unallotted lands as are now used for agency, school, cemetery, or religious purposes shall remain reserved from allotment so long as such agency, school, cemetery, or religious institutions, respectively, are maintained for the benefit of the tribe: *Provided,* That the Secretary of the Interior, upon the request of the tribal council, is hereby authorized and directed to cause to be issued a patent in fee to the duly authorized missionary board or other proper authority of any religious organization heretofore engaged in mission or school work on the reservation for such lands thereon as have been heretofore set aside and are now occupied by such organizations for missionary or school purposes: *Provided further.* That not more than six hun-

dred and forty acres may be reserved for administrative purposes at the Crow Agency, and six tracts of not exceeding eighty acres each, in different districts on the reservation, may be reserved for recreation grounds for the common use of the tribe, or purchased from the tribal funds if no tribal lands are available, and all such lands shall be definitely described and made a matter of record by the Indian Office.

SEC. 6. That any and all minerals, including oil and gas, on any of the lands to be allotted hereunder are reserved for the benefit of the members of the tribe in common and may be leased for mining purposes, upon the request of the tribal council under such rules, regulations, and conditions as the Secretary of the Interior may prescribe, but no lease shall be made for a longer period than ten years, but the lessees shall have the right to renewal thereof for a further period of ten years upon such terms and conditions as the Secretary of the Interior may prescribe: *Provided, however,* that allotments hereunder may be made of lands classified as valuable chiefly for coal or other minerals which may be patented as herein provided with a reservation, set forth in the patent, of the coal, oil, gas, or other mineral deposits for the benefit of the Crow Tribe: *And provided further,* That at the expiration of fifty years from the date of approval of this Act unless otherwise ordered by Congress the coal, oil, gas, or other mineral deposits upon or beneath the surface of said allotted lands shall become the property of the individual allottee or his heirs.[1]

SEC. 7. That there is hereby appropriated the sum of $50,000, or so much thereof as may be necessary,

[1] 51 L. O. D., 96.

from any funds in the Treasury of the United States to the credit of the Crow Tribe of Indians not otherwise appropriated, for the purpose of making the surveys and allotments and for other expenses provided for herein.

SEC. 8. That any allotment, or part of allotment, provided for under this Act, irrigable from any irrigation system now existing or hereafter constructed by the Government on the said reservation, shall bear its pro rata share, computed on a per acre basis, of the cost of constructing such system: *Provided*, That no additional irrigation system shall be established or constructed by the Government for the irrigation of Indian lands on the Crow Reservation until the consent of the tribal council thereto has been duly obtained. All charges against allotments authorized by this section shall be reimbursed in not less than twenty annual payments, and the Secretary of the Interior may fix such operation and maintenance charges against such allotments as may be reasonable and just, to be paid as provided in rules and regulations to be prescribed by him. Unless otherwise paid, these latter charges may be paid from or made a charge upon his individual share of the tribal fund, when said fund is available for distribution; and if any allottee shall receive patent in fee to his allotment before the amount shall become and be a lien upon his allotment, of which a record shall be kept in the office of the superintendent of the reservation at the agency; and should any Indian sell any part of his allotment, with the approval of the Secretary of the Interior, the amount of such unpaid charges against the land so sold shall remain a first lien thereon, and may be enforced by the Secretary of the Interior by foreclosure as a mortgage. All expenditures for irrigation work on the

Crow Reservation, Montana, heretofore or hereafter made, are hereby declared to be reimbursable under such rules and regulations as the Secretary of the Interior may prescribe and shall constitute a lien against the land benefited, regardless of ownership, and including all lands which have heretofore been sold or patented. All patents or other instruments of conveyance hereafter issued for lands under any irrigation project on the said Crow Indian Reservation, whether to individual Indians or to purchasers of Indian land, shall recite a lien for repayment of the irrigation charges, if any, remaining unpaid at the time of the issuance of such patent or other instrument of conveyance, and such lien may be enforced or, upon payment of the delinquent charges, may be released by the Secretary of the Interior. In the case of lands under any project purchased in the bona fide belief on the part of the purchaser that by his purchase he acquired a right to have water from the system for the irrigation of the land purchased by him in the same manner as the Indian owner, the Secretary may, after notice to the Indians interested, determine the value of the land at the time of the purchase from the Indian, and give to the purchaser or his assigns credit on the charge for construction against the land to the amount of the difference between the price paid and the value as so determined, and shall withhold for the benefit of the tribe from the Indian or Indians of whom the purchase was made, an equal amount from any funds which may be due or distributable to them hereunder. Delivery of water to such land may be refused, within the discretion of the Secretary of the Interior, until all dues are paid: *Provided,* That no right to water or to the use of any irrigation ditch or other structure on said reservation shall vest until the

owner of the land to be irrigated shall comply with such rules and regulations as the Secretary of the Interior may prescribe, and he is hereby authorized to prescribe such rules and regulations as may be deemed reasonable and proper for making effective the foregoing provisions: *Provided, however,* That in no case shall any tenance charges for such irrigation privileges, or any of them, until water has been actually delivered to his allotment: *Provided further,* That the Secretary of the Interior shall cause to be made immediately, if not already made, an itemized statement showing in detail the cost of the constrruction of the several irrigation systems now existing on the Crow Indian Reservation separately, the same to be placed at the Crow Agency, and with the Government farmers of each of the districts of the reservation, for the information of the Indians affected by this section.[1]

SEC. 9. That lands within said reservation, whether allotted, un-allotted, or otherwise disposed of, shall be subject to all laws of the United States prohibiting the introduction of intoxicating liquors into the Indian country until otherwise provided by Congress.

SEC. 10. That any unallotted lands on the Crow Reservation chiefly valuable for the development of water power shall be reserved from allotment or other disposition hereunder, for the benefit of the Crow Tribe of Indians.

SEC. 11. That so much of article 2 of the Act of April 27, 1904, entitled "An Act to ratify and amend an agreement with the Indians of the Crow Reservation in Montana, and making appropriations to carry the same into effect" (Thirty-third Statutes,

[1] 8 Fed. (2), 518; 12 Fed. (2), 938.

page 353), as relates to the disposition of the trust funds of the tribe at the expriation of the fifteen-year period named in the Act, to the purchase of cattle, to the distribution of cattle among the Indians of the reservation, to the purchase of jackasses, stallions, and ewes, to the building of fences, the erection of schoolhouses and hospitals, the purchase of additional cattle or sheep, the construction of ditches, dams, and canals, and to the establishment of a trust fund for the benefit of the Crow Indians thereunder, be, and the same is hereby, repealed, effective from and after June 30, 1920: *Provided,* That all unexpended balances of trust funds arising under said agreement shall thereupon be consolidated into one fund to the credit of the tribe, the same to bear interest at the rate of 4 per centum per annum: *Provided further,* That there shall be reserved and set aside from such consolidated fund, or any other funds to the credit of the tribe, a sufficient sum to pay the administrative expenses of the agency for a period of five years; $100,000 for the support of the agency boarding school; $50,000 for the support of the agency hospital, and not to exceed $4,000 of this amount shall be expended in any one year for the support of said hospital; and $50,000 for a revolving fund to be used for the purchase of seed, animals, machinery, tools, implements, and other equipment for sale to individual members of the tribe, under conditions to be prescribed by the Secretary of the Interior for its repayment to the tribe on or before June 30, 1925: *Provided further,* That the expenditure of the sums so reserved are hereby specifically authorized, except those for administrative expenses of the agency, which shall be subject to annual appropriations by Congress: *Provided further,* That after said sums have been reserved and set aside,

together with a sufficient amount to pay all other expenses authorized by this Act, the balance of such consolidated fund, and all other funds to the credit of the tribe or placed to its credit thereafter, shall be distrributed per capita to the Indians entitled: *Provided further,* That the Secretary of the Interior is hereby authorized to permit competent Indians who have received patents in fee and other Indians who have demonstrated their ability to properly care for live stock to withdraw their pro rata share of cattle out of the tribal herd within one year after the approval of this Act, under such rules and regulations as the Secretary of the Interior may prescribe and on condition that said Indians shall execute a stipulation relinquishing all their right, title, and interest in said tribal herd thereafter: *Provided further,* That any Indian who has received his share of live stock in accordance with the above provision and who has also demonstrated his ability to properly care for and handle live stock may also be permitted to withdraw the pro rata shares of his wife and minor children under the same rules and regulations as applied to the live stock already issued to him and on condition that such cattle be branded with the individual brands of his wife and minor children, which shall be recorded in the names of the respective members of his family. It shall be the duty of the superintendent of the Crow Reservation to observe closely the manner in which such stock are handled and cared for, and in case of failure or neglect to properly care for the same the Secretary of the Interior is authorized to take charge of such shares and sell them for the benefit of the individual owners, to whose credit and proceeds of the sale shall be placed, or return them to the tribal herd or handle them with tribal cattle for the minor or in-

competent owners and charge a fee to cover the cost of caring for such live stock.[1]

SEC. 12. That upon the approval of this Act the Secretary of the Interior shall forthwith appoint a commission consisting of three persons to complete the enrollment of the members of the tribe as herein provided for, and to divide them into two classes, competents and incompetents, said commission to be constituted as follows: Two of said commissioners shall be enrolled members of the Crow Indian Tribe and shall be selected by a majority vote of three delegates from each of the districts on the Crow Reservation; and one commissioner shall be a representative of the Department of the Interior, to be selected by the Secretary of the Interior. Said commission shall be governed by regulations prescribed by the Secretary of the Interior, and the classification of the members of the tribe hereunder shall be subject to his approval. That within thirty days after their appointment said commissioners shall meet at some point within the Crow Indian Reservation and organize by the election of one of their personally to classify the members as above indicated. They shall be paid a salary of not to exceed $10 per day each, and necessary expenses while actually employed in the work of making this classification, exclusive of subsistence, to be approved by the Secretary of the Interior, such classification to be completed within six months from the date of organizing the commission.

SEC. 13. That every member of the Crow Tribe shall designate as a homestead six hundred and forty acres, already allotted or to be allotted hereunder, which homestead shall remain inalienable for a

[1] 4 Comp. Genl., 633.

period of twenty-five years from the date of issuance of patent therefor, or until the death of the allottee: *Provided,* That the trust period on such homestead allotments of incompent Indians may be extended in accordance with the provisions of existing law: *Provided further,* That any Crow Indian allottee may sell not to exceed three hundred and twenty acres of his homestead, upon his application in writing and with the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe: *And provided further,* That said land to be sold by said Indian allottee shall not exceed more than one-half of his irrigable nor more than one-half of his agricultural land and shall not include the improvements consisting of his home.

SEC. 14. That exchanges of allotments by and among the members of the tribe may be made under the supervision of the Secretary of the Interior with a view to enabling allottees to group their allotted lands on the Crow Reservation, but always with due regard for the value of the lands involved. And in cases where patents have already been issued for such allotments proper conveyance shall be made back to the United States by the allottee, whereupon the land shall become subject to disposition in the same manner as other lands under the provisions of this Act.

SEC. 15. That the Secretary of the Interior be, and he is hereby, authorized to sell allotted and inherited Indian land held in trust by the United States on the Crow Reservation, Montana, with the consent of the Indian allottee or the heirs, respectively, to any soldier, seaman, or marine who served under the President of the United States for ninety days during the late war against the Imperial German Government, or in any war in which the United

States was engaged with a foreign power, or in the Civil War, who will actually settle on said land, on annual payments covering a period not to exceed twenty years, as may be agreed upon under such rules, regulations, and conditions as the said Secretary of the Interior may prescribe and in accordance with the provisions of this Act.

SEC. 16. That there is hereby granted to the State of Montana for common-school purposes sections sixteen and thirty-six, within the territory described herein, or such parts of said sections as may be nonmineral or nontimbered, and for which the said State has not heretofore received indemnity lands under existing laws; and in case either of said sections or parts thereof is lost to the State by reason of allotment or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized to select other unoccupied, unreserved, nonmineral, nontimbered lands within said reservation, not exceeding two sections in any one township. The United States shall pay the Indians for the lands so granted $5 per acre, and sufficient money is hereby apropriated out of the Treasury of the United States not otherwise appropriated to pay for said school lands granted to the said State: *Provided,* That the mineral rights in said school lands are hereby reserved for the benefit of the Crow Tribe of Indians as herein authorized: *Provided further,* That the Crow Indian children shall be permitted to attend the public schools of said State on the same condition as the children of white citizens of said State.[1]

SEC. 17. That the Secretary of the Interior (with the approval of the Crow Tribal Council) is

[1] 49 L. O. D., 377; 1 Comp. Genl., 180; 4 Comp. Genl., 633.

authorized to set aside for administrative purposes (at the Crow Agency and at Pryor subagency) such tracts for town-site purposes as in his opinion may be required for the public interests, not to exceed eighty acres at each town site, and he may cause the same to be surveyed into lots and blocks and disposed of under such regulations as he may prescribe; land he is authorized also to set apart and reserve for school, park, and other public purposes not more than ten acres in said town sites; and patents shall be issued for the lands so set apart and reserved for school, park, and other purposes to the municipality or school district legally charged with the care and custrody of lands donated for such purposes: *Provided, however,* That the present park at Crow Agency shall not be included in such town site or be subject to such disposition. The purchase price of all town lots sold in town sites shall be paid at such time as the Secretary of the Interior may direct and placed to the credit of the Crow Tribe of Indians.

SEC. 18. That the sum of $10,000, or so much thereof as may be necessary, of the tribal funds of the Crow Indians of the State of Montana, is hereby appropriated to pay the expenses of the general council, or councils, or business committee, in looking after the affairs of said tribe, including the actual and necessary expenses and the per diems paid its legislative committee when visiting Washington on tribal business at the request of the Commissioner of Indian Affairs or a committee of Congress, said sum and the actual and necessary expenses to be approved by and certified by the Secretary of the Interior, and when so approved and certified to be paid: *Provided,* That not to exceed $2,500 shall be expended in any one fiscal year.

Approved June 4, 1920.

APPENDIX H

RESOLUTION NO. 74-05

A RESOLUTION TO RESTRICT HUNTING ON THE CROW INDIAN RESERVATION BY THE ADOPTION OF AN ORDINANCE, AND FOR OTHER PURPOSES.

WHEREAS, during the past decade there has been a 28% INCREASE IN THE ENROLLMENT OF THE Crow Tribe and there has been an unprocedented rise in the prices of meat and most products, and all of these things have caused economic hardships on Crow Tribal members, and

WHEREAS, by virtue of Resolutions No. 64-20 and 67-12 passed, approved, and adopted on November 16, 1963 and September 17, 1966 by the Crow General Council, the Crow Tribe has permitted limited hunting of small game and birds and has permitted fishing on the Crow Indian Reservation, and has caused to be sold hunting and fishing licenses to non-enrolled members of the area and other people thus permitting these said people to hunt and fish within the exterior boundaries of the Crow Reservation, and

WHEREAS, there now exists a shortage of game and fish and this shortage causes an economic hardship to members of the Crow Tribe who for centuries have depended on game to supplement their diet, so

THEREFORE, BE IT RESOLVED, that to help alleviate the game and fish shortage and to help the economic condition of the Crow people that Resolutions No. 64-20 and 67-12 as passed, approved and adopted by the Crow Tribal Council on Novem-

ber 16, 1963 and September 17, 1966 are herewith rescinded, repealed, and removed from the Crow Tribal records, and

BE IT FURTHER RESOLVED, that no more hunting licenses shall be sold to non-enrolled people, and that the following Ordinance shall regulate hunting and fishing on the Crow Reservation from this day forth, and said Ordinance shall read as follows:

ORDINANCE

BE IT ORDAINED, by the Crow Tribe, meeting in a duly held and noticed Council that hunting, fishing, and trespassing within the exterior boundaries of the Crow Indian Reservation is hereby prohibited and the proper officials of the United States and the Crow Tribe of Indians are hereby directed and authorized to enforce the provisions of this ordinance and any Federal Statute which would prohibit such hunting and fishing and trespassing, provided, however, that the provisions of this ordinance shall not apply to members of the Crow Tribe of Indians.

BE IT FUTHER RESOLVED, that the Crow Tribal Council this 13th day of October, 1973 by unanimous votes for passage and adoption and no votes against passage and adoption.

ATTEST:

DAVID J. STEWART, Civilian
Crow Tribal Council

GEORGE A. LaVERDERE,
ACTG. Superindent
Crow Indian Reservation

FREDERICK V. LEFTHAND, SECRETARY
Crow Tribal Council

APPENDIX I

DEFENDANTS' CONTENTIONS

1. The State of Montana owns the bed and banks of the Bighorn River. *United States v. Holt State Bank,* 270 U.S. 49 (1926); *Choctaw Nation, et al. v. Oklahoma,* 397 U.S. 620 (1970).

2. Landowners riparian to navigable waters within the exterior boundaries of the Crow Reservation own to low-water mark. *Oklahoma v. Texas,* 258 U.S. 574; *Packer v. Bird,* 137 U.S. 661, 669-670; *Brewer-Elliott Oil & Gas Co. v. United States,* 260 U.S. 77, 88-89; *United States v. Champlin Refining Co.,* 156 F.2d 769, 773 (10th Cir., 1946), aff'd 331 U.S. 788-789 (1947).

3. Landowners riparian to non-navigable waters within the exterior boundaries of the Crow Reservation own to the middle — or thread — of the stream or lake. *Oklahoma v. Texas, supra; Brewer-Elliott Oil & Gas v. United States, supra;* and *United States v. Champlin Refining Co., supra.*

4. Hunting and fishing by non-members on fee patented lands within the exterior boundaries of the reservation are subject to the exclusive jurisdiction of the State of Montana. *United States v. Wheeler.* U.S. (1978); *Oliphant v. Suquamish Tribe,* U.S. (1978); and *Puyallup Tribe of Indians v. Washington,* U.S. (1977).

5. Fishing and hunting by non-members on tribal or Indian trust lands within the reservation are subject to concurrent jurisdiction of the State of Montana.

6. Grants of the fee to non-members effected an implicit divestiture of jurisdiction over non-members

and also effected a *pro tanto* sharing of all resources not specifically reserved, including fish and game, with the non-members.

7. Non-member, fee landowners riparian to waters within the reservation possess a riparian right of fishery. This riparian right of fishery attaches to non-tribal and non-trust land and is beyond tribal jurisdiction which, by the grant of the fee to the non-member, has been implicitly divested.

8. The resolution passed by the Crow Tribal Council on October 13, 1973, proscribing non-members from hunting, fishing, and trespassing within the exterior boundaries of the reservation is invalid because:

(a) It constitutes a taking of property without due process in violation of the Fifth Amendment to the United States Constitution; and/or

(b) It deprives non-Indians of equal protection of the law guaranteed by the Fifth Amendment to the United States Constitution; and/or

(c) It is an invalid assumption of police power; and/or

(d) It conflicts with federal law which has preempted the subject.

APPENDIX J

UNITED STATES DEPARTMENT of the INTERIOR
BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20240

Mr. John W. Cragun
Wilkinson, Cragun and Barker Law Offices
1616 D. Street, N. W.
Washington, D.C. 20006

Dear Mr. Cragun:

Thank you for your letter of November 14, enclosing a copy of your letter of the same date to the Chairman of the Confederated Salish and Montana Tribes of the Flathead Reservation, expressing your opinion as to the extent of application of the so-called hunting and fishing trespass law, 18 U. S. C. 1165.

Any question that the Superintendent of the Flathead Agency may have concerning the application of the law probably has been submitted to the Billings Area Office. None have been presented here.

The statute in question makes it an offense for anyone, without lawful authority, willfully and knowingly to go upon tribal, trust or restricted Indian land, or upon lands of the United States that are reserved for Indian use, to hunt, trap or fish. Your opinion expresses the view that the Flathead Indians, under the treaty of July 16, 1855 (12 Stat. 575), have the exclusive right of hunting and fishing on all land within the exterior boundaries of the Flathead Reservation, including fee-patented lands. Your opinion reaches the conclusion that this ex-

clusive right in fee-patented land constitutes such land as "lands of the United States that are reserved for Indian use" so that the provisions of 18 U. S. C. 1165 are applicable.

The original legislative proposal that led to the enactment of 18 U. S. C. 1165 use R. R. 7240 in the 85th Congress. It proposed to amend Sec. 1865 of Title 18, entitled "Trespass on national forest lands," by adding a provision to cover land owned by a tribe or group of Indians, as well as individual Indian allotments, in a trust or restricted status. After the report of the Department of the Interior on H. R. 7240 (See House Report No. 2593, 85th Congress, 2d Session.), an amendment was proposed in the Subcommittee of the House Committee on the Judiciary to amend the bill so that it would add a new section to Title 18, as follows:

> "Whoever, without lawful authority or permission, goes upon *Indian country as defined in Sec.* 1151 of this title, for the purpose of hunting, trapping, or fishing, or for the removal of game peltries, or fish, shall be fined not more than $500 or imprisoned not more than six months, or both, and all traps, guns, ammunition, fishing tackle and equipment, game, fish, and peltries in his possession, may be declared forfeited."
> (Underscoring supplied).

The proposal was submitted to the Department of the Interior for comment. There is enclosed a copy of the letter to the Committee, dated May 23, 1958, from the Assistant Secretary of the Interior. This letter calls attention to the fact that the use of the phrase "Indian Country" as defined in 18 U. S. C. 1151 would result in a contention that the law was

intended to apply to non-Indian land within a reservation. The Department strongly recommended against the use of such language and pointed out that the previous report on the bill had been coached in such language as to avoid any argument that it would apply to non-Indian land. The report of the Committee apparently agreed with the Department's position and accordingly modified the proposed amendments. See House Report No. 2593, *supra.*

In view of this legislative background, we are unable to agree with your conclusion that fee-patented land within the Flathead Reservation are "lands of the United States that are reserved for Indian use."

The application of the statute does not depend upon the existence of a tribal right by treaty to hunt or fish on particular land. Rather, it is, by its own terms, limited to trust or restricted Indian land or to land owned by the United States and reserved for Indian use. If the Congress had intended the statute to apply to land other than trust or restricted Indian land or to land owned by the United States and reserved for Indian use within a reservation, it could have assured such application without question by simply making the statute, as was once proposed, applicable to "Indian country" as defined in 18 U. S. C. 1151. In view of the legislative history of the statute, we are unable to agree with your conclusion in this regard.

Sincerely yours,

John D. Crow
Commissioner